

A JUDGE'S GUIDE TO REDISTRICTING



Judge's Guide to Redistricting

Every ten years, across the country legislative boundaries are redrawn in a process known as redistricting. This process is an integral aspect of our nation's promise of democracy because it ensures that voters live in districts that reflect their needs. Redistricting, when done fairly, provides each voter roughly the same opportunity to elect their representatives. The process is nonetheless highly fraught and is the subject of substantial litigation every cycle. As state court judges, you may be tasked with hearing redistricting litigation and deciding whether the maps drawn by your state redistricting body comport with law. This Guide is designed to help you as you review these questions.

In every state, the redistricting process is guided by a series of criteria that redistricters are supposed to consider in drawing maps. Some of these criteria - including compliance with the Voting Rights Act of 1965 and ensuring equal population - are enshrined in federal law. Others, such as consideration of communities of interest or rules related to the splitting of political subdivisions, are instead derived from state constitutions, laws, and case law. This Guide will walk you through these criteria, looking to decisions from courts across the country that have considered how best to address various criteria and applied them to specific maps. It will also discuss metrics and tests that you can use to determine mapmakers' compliance with the criteria. Whether your state legislature performs redistricting, whether redistricting is conducted by an independent redistricting commission, or even whether you as a judge will play an active role in redistricting, this Guide is designed to assist you in ensuring that the maps drawn comply with law and, most importantly, protect a voter's right to have their voice heard.

If our team at the Princeton Gerrymandering Project can be of service to you in considering your cases, please reach out to Adam Podowitz-Thomas, our Senior Legal Strategist, at podowitz-thomas@princeton.edu, or Helen Brewer, our Legal Analyst, at hلبrewer@princeton.edu.

The Redistricting Cycle	3
Criteria	6
Federal Criteria	6
State Criteria	10
Contiguity	11
Crossing Bodies of Water	12
Single Point Contiguity	13
Single Corridor Contiguity	13
Additional Contiguity Considerations	14
Compactness	15
Political Subdivision Boundaries	18
Prior Districts and Incumbency	20
Communities of Interest	21
Partisan Considerations (Fairness, Competitiveness, Proportionality)	24
State-based Minority Protections	29
State-Level Voting Rights Acts	29
State Constitutional and Statutory Provisions	31
Conclusion	33
Appendix	34

The Redistricting Cycle

Every ten years, the United State Census Bureau performs the decennial Census - a house-by-house enumeration of the entire American population. The requirement for the Census is enshrined in Article I, Section 2 of the Constitution, which states, “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.” This enumeration is then used by the Census Bureau to reapportion to the states the number of representatives each has in the United States House of Representatives, as well as their electoral college votes.¹ This reapportionment is necessary because Congress has not expanded the number of its members - 435 - in many decades. Reapportionment is performed using a method known as the “method of equal proportions.” While the specifics of this method are unlikely to be raised in any litigation before state courts, it is important to note that this method is designed to minimize the percentage differences in the number of people per representative - that is, the method tries to ensure that representatives have roughly the same number of constituents, no matter which state they are from. There are obvious limits to this equal proportionality - even the smallest state has at least one representative and the states cannot be divided into partial districts to ensure perfect equivalency - but nonetheless the goal is to ensure that no voter has more or less say in their representation based on where they live. Importantly, in most states, this enumeration and reapportionment does not impact the number of state legislative seats.

Congressional reapportionment is often the subject of extensive coverage in the media. Breathless coverage of which states are gaining seats or losing representatives, and the implications thereof for control of Congress and the Electoral College vote dominate newspapers for several days before and after the release of these numbers. What is important for our purposes is that those states which gain or lose seats are often also the states where redistricting is the most fraught - the forced pairing of incumbents or the opportunity to draw a new district often brings out the worst partisan motives of redistricting actors. In 2021, California, Illinois, Michigan, New York, Pennsylvania, Ohio and West Virginia lost one Congressional seat each, whereas Colorado, Florida, Montana, North Carolina, and Oregon each gained a seat and Texas gained two seats.

Subsequent to reapportionment, the Census Bureau releases detailed population data, known as PL 94-171 data after the law that requires the publication of the data. This data provides the number and certain demographic characteristics² for every American in geographic

¹ Normally, this reapportionment data is released by December 31 of the Census year, with the detailed data, discussed below, released by April 1 of the year following the Census. The 2020 Census data, however, was delayed, both due to the COVID-19 pandemic and litigation regarding the appropriateness of the inclusion of a question on the Census requesting the citizenship of respondents.

² The law also requires that the Census Bureau keep certain information it collects confidential. Historically, it has done so through a number of means, most notably “swapping,” by which certain characteristics of households in one Census block were swapped with the characteristics of another, geographically nearby household, thus obscuring the actual numbers, but ensuring a level of privacy for these households. For the 2020 Census, the Bureau has applied what is known as “differential privacy,” a sophisticated algorithm which establishes a “privacy budget,” obscuring more sensitive data at a specified rate, but ensuring that data is nonetheless still appropriate for redistricting. While

units known as Census blocks. These blocks are often actual city blocks in urban areas, but can represent very different units of geography in different parts of the country. Their population counts range from 0 to 8,727. In 2010, there were 11,155,486 Census blocks in the country, with 4,871,270 blocks with a population of zero. These Census blocks are grouped together into “Census block groups”, for which additional data is available. Redistricters use these Census blocks and block groups to draw the lines from which legislative maps are built.

Confusingly, another unit of importance for voting and redistricting, but which often bears no relationship to Census blocks, is the electoral precinct. These units are products of state law and are the smallest units in which electoral districts can be divided. Most commonly, these precincts are also affiliated with polling places. However, precincts do not always map neatly onto Census blocks or block groups. Because Census blocks must be used to redistrict in order to ensure population equality, this sometimes results in precincts being split into different electoral districts. Many states redraw their precincts following redistricting, to promote cohesion between these two units of geography, but not all do so. It will be important to ensure that the distinction between these two units is retained in your consideration of any redistricting litigation.

After receipt of the PL 94-171 data (also known as “PL data”), the process of redistricting can begin in earnest. In some states, particularly in the 2020 redistricting cycle, the process actually began earlier, with hearings soliciting testimony from the public regarding what they would like to see in maps drawn by redistricters. But for the most part, once states receive the PL data, redistricting begins with state government officials performing whatever data processing is necessary to allow the redistricting entity to begin drawing maps. For example, some states reallocate individuals who are imprisoned to their home addresses, rather than counting them at the institution in which they are incarcerated, as the Census Bureau allocates them. The process of counting incarcerated individuals at the institution in which they are imprisoned is known as prison gerrymandering.

Once the data is prepared, most states begin a public hearing process during which a state’s residents can express what they want to see in that decade’s maps. Some states engage in this process before issuing draft maps, whereas others begin with initial drafts, prepared either by the state’s redistricting body or a separate entity, most often a legislative services office. Sometimes these drafts start from scratch. For example, Arizona begins with grid maps that are created by laying a grid with the number of districts required over a map of the state, and then making adjustments to achieve population equality. Alternatively, initial draft maps may retain the core of prior districts, again making adjustments to achieve population equality based on population changes revealed by Census data.

Regardless of whether public hearings are held, redistricting entities will make modifications to state maps. These modifications can aim to achieve many different goals, from shoring up desired partisan outcomes to protecting the representative interests of communities. They should also ensure compliance with the redistricting criteria enshrined in law. At the

the application of differential privacy has already been the subject of one lawsuit, Alabama v. U.S. Dep’t of Commerce, Civ. No. 3:21-cv-211-RAH (E.D. Ala. 2021), no court has held that its application is inappropriate and thus the data released to states will include this privacy mechanism.

conclusion of the map drawing process, there is often an additional opportunity for the public to comment on the maps before they are formally adopted. Minor modifications may then follow. Then, the maps will be approved by the entity or entities with the authority to do so. For example, in Arizona, the Independent Redistricting Commission approves the maps. In Colorado, the maps approved by the Independent Redistricting Commission must be approved by the state Supreme Court. In Florida, the maps are passed as a normal bill through the state legislature and subject to the Governor's veto. And in North Carolina, the maps are passed as a normal bill through the state legislature, but not subject to the Governor's veto.

Criteria

So, what are maps supposed to do? There is an array of criteria that states must use to determine where district lines should be drawn. First are federal criteria, enshrined in the United States Constitution and in federal law. These include requirements of equal population and guarantees of minority representation. State laws also enshrine additional criteria for redistricters, including in state constitutions and in state statutes. Some states also adopt guidelines each cycle which add additional criteria that reflect the concerns of the current redistricting entity, but to which they do not wish to bind future line drawers. Finally, some states have found additional criteria through their courts and case law developed over time.

Federal Criteria

First and foremost, there are two major requirements with which all maps must comply, enshrined in federal law: equal population and racial fairness.

Equal Population

All maps must comply with the equal population requirement that the Supreme Court has derived from the Equal Protection Clause.³ Compliance with this criterion is determined by taking the total population of a state and dividing it by the number of Congressional districts, which yields the “ideal population” of a district.

Historically, this requirement was understood as exact population equivalency - that is, that each and every Congressional district was required to have precisely the same population, unless the population could not easily be divided into the number of Congressional districts permitted in the state, in which case a deviation of +/- 1 person was permitted.⁴ However, in Tennant v. Jefferson County Commission, the Supreme Court in a per curiam opinion permitted a deviation of 0.79% in West Virginia’s Congressional map.⁵ Pointing to the “legitimate state objectives,” such as refusing to split counties, the Court held that even though sophisticated computer programs could craft perfectly even districts, such exact equivalency was not required. Rather, the court must evaluate several factors, including “the size of the deviations, the importance of the State’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet

³ Wesberry v. Sanders, 376 U.S. 1 (1964).

⁴ The realities of mapdrawing meant that such exact equivalency was rarely achieved, simply because the computer power and data available was simply insufficient to achieve such aims. Additionally, Census data has never been perfectly accurate, with the population shifting after “Census” day and inexact counts an acknowledged problem by the Census Bureau.

⁵ 567 U.S. 758 (2012). This deviation amounted to a difference of 4,871 people between the biggest and smallest district.

approximate population equality more closely.”⁶ The Court provided several exemplar criteria that could permit such deviations, including “avoiding contests between incumbents and not splitting political subdivisions,” but whether other criteria, such as compactness, contiguity, competitiveness, or partisan fairness would merit such consideration is an open question.⁷

For state legislative districts, the Supreme Court has long permitted larger deviations from an ideal population.⁸ Specifically, the Court has generally held that plans with districts that are within +/- 5% of the ideal (so a total 10% range) are presumptively permissible, at least as to compliance with equal population demands. That is not to say that population deviations greater than this range are always unconstitutional, but that they exist beyond the safe harbor threshold and thus the redistricting entity will have a higher burden to prove that the deviation was necessary.⁹

The Fourteenth Amendment and the Voting Rights Act

Beyond equal population, all districts must comply with racial fairness requirements derived from the Fourteenth Amendment and the Voting Rights Act of 1965 (the “VRA”). To start, the Fourteenth Amendment’s Equal Protection Clause in the U.S. Constitution regulates the use of race in redistricting. This clause requires strict scrutiny of any district that is drawn with race or ethnicity as the “predominant factor.” In other words, drawing a district predominantly on the basis of race or ethnicity over other traditional redistricting criteria is presumptively unconstitutional, unless the state can prove that it had a compelling interest in doing so and the district was narrowly tailored to meet this interest. Compliance with the Voting Rights Act has been accepted by the Supreme Court as a possible compelling interest to justify the use of race and ethnicity in line-drawing.¹⁰ It is unclear whether there are other compelling interests that state governments may have regarding the use of racial data in drawing district lines. We anticipate litigation over “communities of interest” defined along ethnic and racial commonalities to be subject to extensive litigation this cycle; these communities of interest will be discussed in further detail, below.

The VRA also prohibits discrimination against ethnic and racial minorities and was designed to protect minorities’ right to vote. It requires that linedrawers must, in certain cases, provide minorities the opportunity to elect a candidate of their choice. Two sections of the Act have been important for redistricting:

⁶ *Tennant*, 567 U.S. at 760 (quoting *Karcher v. Daggett*, 462 U.S. 725, 741 (1983)).

⁷ *Id.* at 764.

⁸ See, e.g., *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835 (1983); *Voinovich v. Quilter*, 507 U.S. 146 (1993).

⁹ See *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947, 2004 (mem.).

¹⁰ See, e.g., *Alabama Leg. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015).

1. Section 2 of the Voting Rights Act prevents a state from engaging in any practice that results in the denial or abridgment of anyone's right to vote based on race, color, or minority language status.¹¹ It protects against vote dilution and cracking.

2. Section 5, which is currently of limited effect due to the Supreme Court's decision in *Shelby County v. Holder*, required that certain jurisdictions with a history of racial discrimination get preclearance from the federal government for their maps before they went into effect. Under preclearance, the state had to show that minority voters in covered areas were no worse off than in the previous map. Such backsliding is called retrogression.¹²

A citizen from the district who believes he or she has been racially discriminated against must demonstrate to a court that the government did so intentionally. Evidence of discriminatory intent can include statements from legislators or their staff, bizarrely shaped districts, or highly targeted use of data. The court may then assume that the district is unconstitutional unless the state can show that the Voting Rights Act compelled it to use race as it did. Without such proof, the district must be redrawn. As a result, a court should examine whether the redistricting entity considered race in combination with other factors when drawing district lines, so that race works alongside other factors, but did not predominate, in deciding which voters to place within or without a district.

Proof of discrimination under Section 2 of the Voting Rights Act focuses to a greater extent on discriminatory impacts rather than intent. Redistricting decisions that have the effect of discriminatorily impacting minorities, for instance the cracking of voters between multiple districts, may be subject to a Section 2 claim.

Both Fourteenth Amendment and Section 2 claims must focus on specific districts. A useful rule of thumb is that Section 2 of the Voting Rights Act protects against diluting minority vote strength across many districts ("cracking" or splitting a minority group across several majority-white districts so they cannot win anywhere), while the Fourteenth Amendment protects against excessive concentration of minority voters ("packing" or overly concentrating minorities into a single district to minimize the overall number of seats minorities can win).

Methods for suppressing the ability of members of minority groups to elect representatives are collectively called vote dilution. Vote dilution can pose a significant drawback for minorities because as a small share of the total population, they cannot form a bloc

¹¹ The United States Supreme Court decided *Brnovich v. DNC*, 141 S. Ct. 2321 (2021), in July 2021, which dealt with Section 2 of the VRA, but not in its application to redistricting. Rather, that case dealt with what is known as "vote denial," wherein minority voters are prevented or severely limited in their ability to vote (in *Brnovich*, related to who could return mail-in ballots and whether out-of-precinct ballots would be partially counted). Redistricting cases are known, in contrast, as "vote dilution" cases because the relative weight of each minority voters vote is lessened, due to the makeup of the district they are placed in.

¹² At the time of writing this guide, HR1/S1, the "For the People Act", and HR4, the "John Lewis Voting Rights Advancement Act" had not passed Congress. Either bill could impact several provisions of the VRA, but these potential impacts are not discussed, as they are not currently law.

large enough to elect a candidate of their choice when a polarized majority seeks all of the available seats for itself.

One possible remedy to minority vote dilution is the construction of a majority-minority district. They are called majority-minority districts because in them the minority group constitutes at least a simple majority of the voting-age population. A majority-minority district is designed to satisfy Section 2 of the Voting Rights Act by creating an opportunity for minorities to elect a representative of their choice. However, the term majority-minority district may leave the false impression that the Voting Rights Act always requires a district created under the Act to consist of at least 50 percent of voting age persons of the protected minority group. Under current federal law, it is not always mandatory for opportunity-to-elect districts to have a majority of minority voters. Indeed, a map composed of majority-minority districts in Virginia was found to be a racial gerrymander because it packed black voters more than necessary to elect representatives.

A majority-minority district is not the only way to satisfy the VRA mandate. The real measure of opportunity to elect is for the minority community to reliably win elections for the candidates of its choice. In cases where majority and minority voters overlap sufficiently in their candidate preferences, this can happen with a district that is less than 50 percent minority. For example, Section 2 could potentially be satisfied by creating an opportunity-to-elect district, in which the minority group is large enough to play a dominant role in the primary election of a party that is likely to win at least 50 percent of the vote in the general election. Research in political science shows that a minority group will typically have the opportunity to elect in a district if the percentage of minority voting age population falls between 30 and 50 percent. The range depends mostly on the percentage of white people that also vote for the candidate that the minority group prefers. The percentage can go as low as 30 percent because of primary elections, in which a minority group can exert its influence at an earlier stage in the election process. A district in which a minority group is able to elect its candidate of choice because a sufficient portion of the white majority votes with the minority is also known as a crossover district. It is also worth highlighting that, in some circumstances, different minority groups may be grouped together into a single district, where neither group by itself would be large enough to form a voting majority, but collectively their populations ensure that their vote will be decisive; these districts are known as coalition districts.

For a court evaluating a map for compliance with Section 2 of the VRA, the Supreme Court has laid out a fairly clear test in Thornburg v. Gingles.¹³ Generally, a court must perform the inquiry in two steps. In the first step, one must answer yes to the following questions to create an opportunity-to-elect district:

1. Is there a sufficiently large concentration of minority voters?
2. Would they generally vote for the same candidate?
3. Would the rest of the voters in the area generally choose different candidates?

¹³ 478 U.S. 30 (1986).

The first question aims to understand if the minority population is big enough in a compact area to merit an intervention. For example, it is possible Native tribes may qualify for representation through a district in the state legislature, even if their population is not large enough to determine the outcome of a Congressional election.

The second and third questions aim to understand if voters are racially polarized. The extreme scenario would be that all white voters vote for one party and all minority voters vote for an opposing party. A less extreme example of racially polarized voting would be if 70 percent of white voters choose candidate A and 70 percent of minority voters choose candidate B. Experts use several statistical measures that capture the degree of racial polarization.

In the second step, a court asks if the minority voters are otherwise protected in the “totality of the circumstances.” If not, the opportunity-to-elect district is needed. As Congress passed the 1982 VRA Amendment, the Senate Committee on the Judiciary suggested courts consider the following circumstances to understand whether an opportunity-to-elect district is necessary, the so-called “Senate Factors”:

- Has there been a history of voting-related discrimination?
- What is the extent of existing discriminatory voting practices?
- How racially polarized is the vote?
- Are minority groups excluded from how the party candidate gets chosen?
- How much does the minority group bear the effects of past discrimination for education, employment, and health which hinder their ability to participate in the political process?
- How many minority members have been elected in the past?
- How responsive are current elected officials to the specific needs of the minority group?

The three numbered questions above combined with the “Senate Factors” constitute the “Gingles standard.” If a state plan discriminates against a minority group, it does not matter if the discrimination was intentional or not. In either case, what matters is if the plan has the effect of discrimination. This is easier to demonstrate to a court than proving discriminatory intent.

State Criteria

In addition to the federal criteria, every state has its own set of criteria with which maps must comply. Like the federal criteria, these mandates can derive from state constitutions, state statutes, or caselaw. As the discussion below demonstrates, state redistricting criteria often overlap; courts often discuss multiple criteria at once, or analysis of one factor bleeds into analysis of another. Whether you, as a state judge, decide to analyze a redistricting plan holistically, considering several of your state’s redistricting criteria in a single, big-picture

evaluation, or whether you prefer to analyze each criterion on its own terms, a clear understanding of each individual concept might help inform your analysis.

It's worth noting that states also differ in their approaches to the hierarchy of criteria. Some states, such as Michigan and California explicitly rank-order the priorities that redistricters are supposed to approach line drawing, with lower ranking criteria permissibly sacrificed to achieve higher ranked criteria, if necessary. Other states, such as Arizona, do not rank their criteria, rather listing them all as goals to be achieved, and the tradeoffs between the various criteria in the eyes of the line drawers.

The following criteria are common in state constitutions and statutes. In some states, redistricting criteria can also be rooted in caselaw or found in guidelines adopted by redistricting commissions. Many courts in many states have analyzed these criteria. The selection of state court decisions below seeks to provide examples of general principles that might guide a state court's decision regarding a particular criterion as well as specific examples of how a court might confront certain districting plans; for example, what should a court do when a district needs to cross a body of water or a mountain range? These cases also deal with a variety of statutory and constitutional provisions to allow you to identify states with similar provisions to your own state's laws and examine how other states have interpreted similar language. The footnotes and appendix of quotes at the end of this guide provide additional examples of different states' approaches to each criterion.

Contiguity

Forty-two state constitutions require that districts be contiguous, and all fifty states require it in some form (statute, constitution, or judicial precedent).¹⁴ Although a few cases have overturned redistricting plans based on the contiguity requirement, many have “stretched” the provision to include rivers, highways, mountain ranges, or even two corners meeting in a single point.¹⁵ While contiguity is a fairly weak requirement, it does prevent the packing of voters into isolated islands based on their voting history, instead requiring at least some physical connection between the various points in a district. A district's contiguity is typically analyzed by a simple

¹⁴ See *Redistricting Criteria*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last accessed Aug. 30 2021).

¹⁵ See *In re Apportionment Law Appearing as S. J. Res. 1 E*, 414 So. 2d 1040, 1051 (Fla. 1982) (holding that a district lacks contiguity only when a part is isolated from the rest by the territory of another district, and that because the touching of points means there is no district between two parts of a single district, point contiguity satisfies the contiguity requirement); *Bd. of Superiors of Houghton v. Blacker*, 52 N.W. 951, 953 (Mich. 1892) (holding that islands in the Great Lakes could be contiguous over water); *In re Sherill v. O'Brien*, 81 N.E. 124, 130 (N.Y. 1907) (holding that the ordinary and plain meaning of the word “contiguous” is not a reference to nearness or proximity, but rather territory which is “touching, adjoining, and connected, as distinguished from territory separated by other territory”); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 849, 869–70 (Ariz. Ct. App. 2005) (holding that a narrow, 103-mile serpentine corridor partially following the Colorado River through the Grand Canyon to connect two Native American tribes' reservations into a single majority-minority district satisfied the contiguity requirement because the district was geographically connected).

visual verification: either all the land in the district is connected within the district's borders, or it is not.

Crossing Bodies of Water

ISLANDS ARE CONTIGUOUS BY LAND TO THE COUNTY OF WHICH THEY ARE A PART.



In 2011, the entirety of Charlevoix County, including Beaver Island, was included in State House District 105.

Source: U.S. Census

States with many rivers, large bodies of water, or islands often find themselves with legislative districts that encompass areas of land separated by water. Oftentimes this is necessary to satisfy population equality requirements or other redistricting criteria. State courts typically find that districts that cross bodies of water are contiguous.

The Michigan Constitution requires that legislative districts be “geographically contiguous.”¹⁶ In a case involving a districting plan that placed some Upper Peninsula counties in the same district as an island in Lake Superior, the Michigan Supreme Court explicitly held that “[contiguous] does not mean in contact by land.”¹⁷ Michigan districts can encompass portions of the mainland as well as islands in the Great Lakes, even though the islands are “separated by wide reaches of navigable deep waters.”¹⁸

Many states must also draw districts that cross large rivers. The Missouri Supreme Court, for example, upheld a redistricting plan in which rivers made it impossible to travel through some districts; a person would have to travel through a different district to get to the other end of their own district. The court noted that “[t]he plain and ordinary meaning of ‘contiguous’ is provided by the dictionary definition of ‘touching or connected throughout.’”¹⁹ Even so, the court ruled that “[t]he separation of one part of a district from another part of a district by a large river does not violate Missouri's constitutional requirement that the district be composed of contiguous territory.”²⁰

¹⁶ MICH. CONST. art. IV, § 6.

¹⁷ *Houghton*, 52 N.W. at 953.

¹⁸ *Id.*

¹⁹ *Johnson v. State*, 366 S.W.3d 11, 31 (Mo. 2012).

²⁰ *Id.* Virginia's supreme court has likewise allowed districts to cross large rivers even where they begin to widen significantly as they empty into the Chesapeake Bay. Virginia's constitution requires that districts be made up of “contiguous and compact territory.” VA. CONST. art. II, § 6. The state supreme court has held that “the geography and population of this Commonwealth necessitate that some electoral districts include water, and that land masses separated by water may nevertheless satisfy the contiguity requirement in certain circumstances.” *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002).

Single Point Contiguity

Single-point contiguity occurs when different areas of a district are connected to one another by only one small touching point. (Imagine two squares touching one another by only their corners.) This is in contrast to a district that is contained, for example, within the boundaries of one circle, oval, or even serpentine-like shape.

Some states allow single-point contiguity, while other states disfavor the practice. Florida has permitted single-point contiguity to some extent, holding that contiguity principles are only violated if a portion of a district is completely separated from the rest of the district.²¹ While the Florida Supreme Court embraced a definition of contiguity that includes “touching...at a point,” the court also noted that a district comprised of two areas of land that only touch at a single, right angle corner, for example, would not be contiguous.²² The North Carolina Supreme Court has explicitly disfavored single-point contiguity, holding that “two districts must share a common boundary that touches for a non-trivial distance.”²³

Single Corridor Contiguity

Sometimes, redistricters create districts whose boundaries connect two separate areas of a state by narrowly following a highway or other corridor. Courts may or may not frown upon a district drawn in this manner. The Arizona Court of Appeals, for example, upheld a district that carved the Hopi Tribe out of the district surrounding them, which was comprised mainly of the Navajo Nation, and connected the Hopi Tribe to another district by extending that district’s boundaries for 103 miles along the Colorado River, including no population. Arizona’s constitution requires that districts be “geographically compact and contiguous to the extent practicable.”²⁴ The court of appeals held that because the district at issue in that case “track[ed] the Colorado River through the Grand Canyon and geographically connect[ed] the Tribe with the remaining portion of district 2... [the district was] geographically contiguous.”²⁵

²¹ *In re Apportionment Law Appearing as S. J. Res. 1 E*, 414 So. 2d 1040, 1051 (Fla. 1982).

²² *Id.* (citations omitted)

²³ *Stephenson v. Bartlett*, 582 S.E.2d 247, 254 (N.C. 2003).

²⁴ ARIZ. CONST. art IV, Part 2, § 1.

²⁵ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 869–70 (Ariz. Ct. App. 2005).

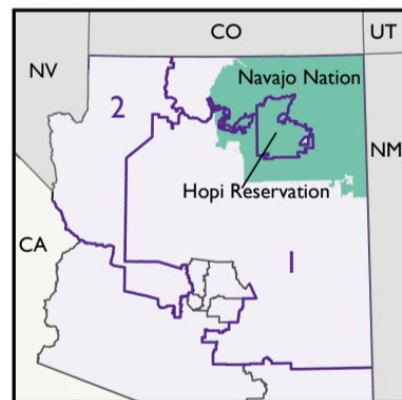
Additional Contiguity Considerations

While the plain definition of contiguity is simple and contiguity can often be evaluated by simply looking to see whether a district is contained within a single boundary, some courts view contiguity more broadly, defining it not only as a measure of a district's shape but in light of its relationship to other redistricting criteria.

Following the 2001 redistricting cycle, the Virginia Supreme Court seemed receptive to the idea that whether a district is contiguous may depend in part on considerations that are not strictly geographical. In that case, the petitioners argued that a district was not compact because one could not easily travel throughout the entire district. The court acknowledged that ease of travel might be a factor in compactness and contiguity analyses. However, the Supreme Court disagreed with the trial court's ruling that there must be a bridge, ferry, or other mechanism "allowing full internal access to all parts of the district."²⁶ The court held that "resting the constitutional test of contiguity solely on physical access within the district imposes an artificial requirement which reflects neither the actual need of the residents of the district nor the panoply of factors which must be considered by the General Assembly in the design of a district."²⁷

Although the Virginia Supreme Court did not find a contiguity violation in this case, its view of contiguity incorporated ease of travel and concerns about political responsiveness. The court did not find the petitioners were mistaken to assert that factors such as ease of travel and the resulting relationships among district residents and their elected officials were an improper part of the contiguity analysis. Instead, the court found that their concerns were simply already taken care of. The court determined that "in today's world of mass media and technology, [the trial court's view of contiguity] is not necessary for communication among the residents of the district or between such residents and their elected representative."²⁸ Thus, the court did not suggest that ease of travel was irrelevant to contiguity, but rather held that the values ease of travel promotes were already served by the district in light of modern technology. The fact that the court refused to impose a contiguity requirement that failed to reflect "the actual need of the residents of the district"²⁹ suggests that the court viewed contiguity as a criterion that can encompass factors beyond strict geography when it serves the voters by encouraging things like political responsiveness.

IF NECESSARY, TWO SEPARATE AREAS CAN SOMETIMES BE MADE INTO ONE CONTIGUOUS DISTRICT WITH A THIN CONJOINING STRETCH.



In 2001, Arizona's Redistricting Commission connected the Hopi reservation to the 2nd Congressional District via a thin, contiguous stretch of land, only as wide as the Colorado River in some sections so that the Hopi reservation and Navajo Nation could be assigned to different Congressional Districts.

Source: U.S. Census

²⁶ *Wilkins*, 571 S.E. 2d at 109.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

In contrast, the Arizona Court of Appeals was unwilling to engage with the argument that ease of travel is a necessity for contiguity when considering the validity of the aforementioned Colorado River district. Instead, the court held that difficult travel does not preclude contiguity and explicitly noted that Arizona law “sets forth a goal of geographic contiguity, not geographic accessibility.”³⁰ Unlike the Virginia Supreme Court’s view that ease of travel might inform compactness and contiguity, the Arizona Court of Appeals stuck more strictly to the plain definition of contiguity. The court also explicitly agreed with the Virginia Supreme Court’s reasoning that modern technology enables residents of a district to communicate effectively with one another and with their elected representatives, rendering ease of travel and physical access requirements “artificial.”³¹

Compactness

Thirty-three states require that state legislative districts, congressional districts, or both be compact, either constitutionally or by statute.³² Compactness has several dozen legally accepted meanings, some based purely on geometric shape and some on population patterns. Courts’ struggles with defining compactness have led some state courts to conclude that legislatures themselves get to decide whether a district is compact, effectively neutering the provision altogether.³³ But some state courts see compactness provisions in their intended light, as a check on the power of the legislature. From this conclusion, it necessarily follows that the courts, not legislatures, should determine which definitions of compactness to use when evaluating such claims.³⁴

Numerous mathematical formulas exist to compute a district’s compactness. Three common mathematical measurements of compactness are the Reock test, the Polsby-Popper test, and an area-to-perimeter ratio.



³⁰ *Ariz. Minority Coal.*, 121 P.3d at 364.

³¹ *Id.*

³² See *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last accessed Aug. 30 2021).

³³ See *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 748 (Va. 2018) (“(S)ocial scientists have developed at least 50 different methods of measuring compactness.”).

³⁴ See, e.g., *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *In re S. J. Res. of Leg. Apportionment 1176*, 83 So.3d 597 (Fla. 2012).

The Reock score is calculated by drawing a circle around the district such that the entire district is encompassed within a perfect circle.³⁶ Then, the area of the district is compared to the area of the circle. A score of 1 is optimally compact, while a score of 0 is not compact.

A district's Polsby-Popper score is determined by the ratio of the area of the district to the area of a circle whose circumference matches the perimeter of the district; in other words, the area of the circle that would result if you stretched the district out to be a circle. The less contorted the boundaries of a district are (and thus the more it already resembles a circle), the more compact the district is. A Polsby-Popper score of 1 is optimally compact, while a score of 0 is not compact.

A score based on the ratio of a district's area to its perimeter will be closer to 1 when the district is more compact and closer to 0 when the district is less compact.

Beyond these technical measurements, courts might also use something as simple as the "eye test" to determine whether a district is compact. As its name suggests, this involves simply looking at a district and seeing if it forms a relatively normal shape (think something resembling a rectangle or even a trapezoid) or whether it forms a shape that looks immediately unusual (for example, a very long, thin district with many "tentacles" reaching a long distance off of it³⁷).

Although courts might view strangely shaped districts as indicators of a problematic or improper redistricting process,³⁸ they often recognize that unique features of a state's geography or demographics may produce irregularly shaped districts. When this is the case, courts will not necessarily strike down a map just because it contains oddly shaped districts.³⁹ For example, the New York Court of Appeals has acknowledged that New York's "islands, rivers, lakes and other geographical features," along with its densely populated cities, "may necessitate [district] boundaries that are ragged at best," especially in order to comply with equal population mandates.⁴⁰ The New York Court of Appeals saw this as reason to pay significant deference to

³⁵ Falko Nordenholz, Simon Metzler & Christian Winkler, *An Automated Gradual Zoning Approach for Large-Scale Transport Models*, 151 *PROCEDIA COMPUT. SCI.* 147, 151 (2019).

³⁶ This is also known as a minimum bounding circle. The circle is just big enough to encompass the district inside it. The outermost points of the district's boundaries touch the perimeter of the circle. Imagine an equilateral triangle inside a circle where each point of the triangle touches the boundary of the circle.

³⁷ To name just one example of a court disapproving of oddly shaped districts, the Alaska Supreme Court has observed that "[C]orridors' of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting." *Hickel v. Se. Conf.*, 846 P.2d 38, 45-46 (Alaska 1992).

³⁸ *E.g.*, "Compact districting should not yield 'bizarre designs.' We will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact. The compactness inquiry thus looks to the shape of a district." *Hickel*, 846 P.2d at 45 (citations omitted).

³⁹ Although the Alaska Supreme Court maintained that redistricting should not produce bizarrely shaped districts in *Hickel*, the court noted in that same case that "[o]dd-shaped districts may well be the natural result of Alaska's irregular geometry." *Hickel*, 846 P.2d at 45. It is also important to note, as will be discussed further below and was referenced above, that oddly-shaped districts could be used to achieve important minority-representation interests.

⁴⁰ *Schneider v. Rockefeller*, 293 N.E.2d 67, 72 (N.Y. 1972).

the legislature's determinations about where to sacrifice compactness.⁴¹ That court went as far as to say that "the constitutional requirement of compactness is peripheral" to the geographic realities of the state that may produce irregularly shaped districts.⁴²

Like with contiguity, some state courts view compactness in light of the broader policies they believe compact districts are supposed to serve. The Missouri Supreme Court has found "that 'compact' for Missouri redistricting purposes means 'closely united territory' and [rejected] the proposition that 'compact' refers solely to physical shape or size."⁴³ In light of this view, that court held that the eye test, "although relevant, is not the decisive factor in determining whether a district departs from the principle of compactness."⁴⁴ Similarly, the Court of Appeals of Maryland has held that "the compactness requirement in state constitutions is intended to prevent political gerrymandering....[A]n affirmative showing is ordinarily required to demonstrate that such districts were intentionally so drawn to produce an unfair political result, that is, to dilute or enhance the voting strength of discrete groups for partisan political advantage or other impermissible purposes. Thus, irregularity of shape or size of a district is not a litmus test proving violation of the compactness requirement." These courts did not limit determinations regarding compactness to the shape of a district, but looked to issues including partisan fairness and vote dilution when determining whether districts were compact.

The New Mexico Supreme Court, like several other states, has recognized a relationship between compactness and the responsiveness of legislators. In a 2012 case, the court explained that "[c]ompactness and contiguity are important considerations because these requirements help to reduce travel time and costs."⁴⁵ In turn, according to the court, elected officials can more easily "maintain close and continuing contact with the people they represent."⁴⁶ This analysis takes compactness beyond the simple question of a district's geometry and looks to the political and social dynamics that compactness may influence. The California Supreme Court has taken a similar view, writing that "[c]ompactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency."⁴⁷

On the other hand, the Florida Supreme Court has refused to consider factors beyond a district's shape when analyzing compactness. The Florida court held that "[e]xpanding the definition of compactness to include factors such as the ability to access and communicate with

⁴¹ *Id.* At the same time, the court noted that the legislature's compactness calculations could include "political subdivision lines, topography, means of transportation and lines of communication." *Id.* This incorporates the preservation of political subdivisions and factors that could be related to communities of interest (means of transportation and lines of communication) into the compactness analysis, demonstrating how a factor that might seem like it is only about the shape of a district can involve many more underlying considerations.

⁴² *Id.* The Virginia Supreme Court has likewise held that the state legislature is in the best position to decide how compactness should be defined and how compact districts should be. It has viewed compactness as "political," a "value judgment," and an "abstract concept" that should be evaluated by the state legislature, not the state courts. *Vesilind*, 813 S.E.2d at 748-49 (citations omitted).

⁴³ *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. 2012) (citations omitted).

⁴⁴ *Id.* at 48-49.

⁴⁵ *Maestas v. Hall*, 274 P.3d 66, 78 (N.M. 2012).

⁴⁶ *Id.*

⁴⁷ *Wilson v. Eu*, 823 P.2d 545, 574 (Cal. 1992).

elected officials and their ability to relate and interact with one another would be contrary to the average voter's understanding of compactness ... [U]sing such a broad definition of this term would almost read out the requirement of compactness" altogether.⁴⁸ Although the court held that "[a] compactness requirement serves to limit partisan redistricting and racial gerrymanders," it simultaneously held that "[i]f we were to include 'communities of interest' within the term 'compactness,' the Court would be adding words to the constitution that were not put there."⁴⁹

Political Subdivision Boundaries

Thirty-three state constitutions limit how many local government boundaries can be crossed in a redistricting plan.⁵⁰ These are often limits on how many times a redistricting plan can cross county lines, but some states also require redistricters to avoid splitting up cities or towns as much as practicable.

Tennessee law, for example, says that up to thirty counties can be split one time each in a redistricting plan. In the state's urban counties, the Tennessee Supreme Court has "left open the possibility of a small split per county only if justified by the necessity of reducing a variance in an adjoining district or to prevent the dilution of minority voting strength."⁵¹ Somewhat similarly, Texas requires that district boundaries track county lines but does not impose a limit on how many counties can be divided.⁵² When multiple counties must be grouped together in a single district to attain population equality, Texas law dictates that the district should follow the county lines and encompass the entirety of each of the counties within the district.⁵³ The only acceptable reason to stray from this requirement is to comply with the 14th Amendment's equal population mandate.⁵⁴

Some states impose specific procedures redistricters must follow when determining whether and how to split political subdivisions. For example, the Michigan Supreme Court held in 1982 that when county lines must be crossed in a redistricting plan in order to achieve population equality, redistricters should still try to avoid splitting up towns or cities.⁵⁵ North Carolina implements a complex procedure that involves "clustering" together counties that are too sparsely populated to constitute their own districts and then drawing districts within those

⁴⁸ *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 633-34 (Fla. 2012).

⁴⁹ *Id.* at 632-33.

⁵⁰ See *Redistricting Criteria*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last accessed Aug. 30 2021).

⁵¹ *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 844 (Tenn. 1983).

⁵² *Smith v. Craddick*, 471 S.W.2d 375, 377 (Tex. 1971) (citing TEX. CONST. art. III, § 26).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *In re Apportionment of State Legis.*, 321 N.W.2d 585, 588-589 (Mich. 1982). Michigan's requirements go into even more detail. For example, if two redistricting plans are suggested that split the same number of county lines, the plan that "shifts the fewest cities and townships statewide shall be selected; if more than one plan shifts the same number of cities and townships statewide, the plan that shifts the fewest people in the aggregate statewide to election districts that break county lines shall be selected." *Id.* at 588.

clusters; districts should not cross the outer boundaries of the cluster but can cross individual county lines within the cluster.⁵⁶

When state law does not impose limits on how many political subdivisions redistricters can split up, state courts might use their discretion or consult expert advice (if available in the case) to determine whether or not an unreasonable number of political boundaries have been crossed. The Maryland Court of Appeals found that the state legislature split “an excessive number of political subdivision crossings” in a redistricting plan that divided Baltimore County among 12 state senate districts.⁵⁷ The court found that the political subdivision splits in the plan could not be justified by “evidence presented to the Special Master,”⁵⁸ and thus struck the plan down.

Some courts see the preservation of political subdivisions as intersecting with communities of interest and political responsiveness. For example, in 2002 the Colorado Supreme Court struck down a state legislative map that divided counties between multiple districts even though the counties were populous enough to contain entire state senate districts within their boundaries.⁵⁹ The court found that splitting these counties up among multiple districts was improper because “[a] direct line of accountability between citizens, their elected city councils and county commissioners, and their elected state representatives is at the heart of responsive government in Colorado and is built into the county-oriented design of the Constitution's reapportionment provisions.”⁶⁰ The Colorado court prioritized preserving political subdivisions in order to foster cohesion and a responsive relationship between elected officials and the people they represent.

Similarly, the New Jersey Supreme Court has frowned upon dividing counties between multiple legislative districts because “[t]he citizens of each county have a community of interest by virtue of their common responsibility to provide for public needs and their investment in the plants and facilities established to that end.”⁶¹ Vermont law likewise maintains that political subdivisions should be preserved because voters who live in the same locality are inherently concerned with similar local issues and should be able to vote on those issues as a single district.⁶² The Vermont Supreme Court has held that “unnecessary fragmentation of [local government] units limits the ability of local constituencies to organize effectively and increases voter confusion and isolation.”⁶³ This view focuses on how political subdivision splits will affect

⁵⁶ The provision of state law that lays out these requirements is called the Whole County Provision. It also applies to counties that are too big to be a single district but do not have enough population to support multiple districts drawn within the county. *E.g.*, Stephenson v. Bartlett, 562 S.E.2d 377, 397 (N.C. 2002).

⁵⁷ In re Legis. Districting of State, 805 A.2d 292, 323, 325 (Md. 2002). In addition to Baltimore, the plan at issue in this case divided up other political subdivisions in a similar manner.

⁵⁸ *Id.* at 323, 325, 329.

⁵⁹ In re Reapportionment of the Colo. Gen. Assembly, 45 P.3d 1237, 1251-52 (Colo. 2002).

⁶⁰ *Id.* at 1248.

⁶¹ Jackman v. Bodine, 205 A.2d 713, 718 (N.J. 1964).

⁶² “Local governmental units have various responsibilities incident to the operation of state government in a wide range of areas, including the court system, law enforcement, education, mental health, taxation, and transportation.” In re Reapportionment, 624 A.2d 323, 330 (1993).

⁶³ *Id.*

voters directly, both logistically as they try to understand what districts they belong to and should vote in and as they try to decide how to most effectively make their voices heard.⁶⁴

While some courts, like those in Vermont and Colorado, have at times incorporated a community of interest-like analysis into their evaluations of political boundary divisions, others have not recognized an overlap between these factors. The Maryland Supreme Court has rather directly rejected the notion that communities of interest can be prioritized over or treated as on par with preserving political boundaries. In a 2002 case, the Maryland Supreme Court thus held that, although constitutional criteria such as the preservation of political boundaries can be flexible, “such things as the promotion of regionalism and the protection of non-official communities of interest [cannot] overcome [the political subdivision] requirement.”⁶⁵

Prior Districts and Incumbency

Another factor that sometimes figures in the redistricting process is the preservation of prior districts, which can affect whether incumbent legislators are likely to be reelected. A redistricting plan that largely preserves preexisting districts is more likely to protect incumbents because the districts will contain many of the exact same voters who previously elected the incumbent. Conversely, a redistricting plan could “pair” incumbents, which means that the plan rearranges districts such that two incumbents under the old map are now in the same district. One of those incumbents will thus no longer hold office.⁶⁶ A map could also disadvantage incumbents by creating very different districts or making them more competitive.

As with any redistricting criteria, state statutes, constitutions, or redistricting commission guidelines may require or prohibit consideration of these factors. Different state courts may also take different views on what role, if any, these criteria should play in the redistricting process. The New Mexico Supreme Court succinctly summarized the U.S. Supreme Court’s view of these redistricting criteria, noting that “incumbency protection cannot be justified if it is simply for the benefit of the officeholder and not in the interests of the constituents.”⁶⁷

After the 2011 redistricting cycle, the Minnesota Supreme Court’s Special Redistricting Panel determined that “[l]egislative districts shall not be drawn for the purpose of protecting or defeating incumbents.”⁶⁸ However, the Minnesota Supreme Court allowed the panel to “consider the impact of redistricting on incumbent officeholders to determine whether a plan results in either undue incumbent protection or excessive incumbent conflicts.”⁶⁹ The court required that

⁶⁴ In this case, these concerns led the court to strike down a districting plan that, among other things, placed a town from one county into a district with four towns from a different county. The court disapproved of this county split and returned the plan to the state legislature to be reconsidered. *See generally In re Reapportionment*, 624 A.2d 323 (1993).

⁶⁵ *In re Legis. Districting of State*, 805 A.2d 292, 297 (Md. 2002).

⁶⁶ This presupposes, as is the case in most states, that elected officials must live in the district they seek to represent.

⁶⁷ *Maestas v. Hall*, 274 P.3d 66, 79 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 403 (2006)).

⁶⁸ *Hippert v. Ritchie*, 813 N.W.2d 374, 385 (Minn. 2012) (citations omitted).

⁶⁹ *Id.* at 386.

incumbency considerations be “subordinate” to all other redistricting criteria.⁷⁰ The court thus put a high premium on the importance of voters selecting their own representatives, as well as redistricting criteria already enshrined in law.⁷¹

The Vermont Supreme Court has also allowed incumbency to be considered in the state’s redistricting process only after other criteria were considered and adhered to.⁷² The court has taken a narrow view of the incumbency criteria and has held that it should only be used to choose between two similar plans when one choice creates more “contests between incumbents” than the other, favoring the plan that creates fewer contests.⁷³

Communities of Interest

Of all the criteria considered by most states, perhaps the most malleable and least quantifiable⁷⁴ yet of central conceptual importance, is that districts preserve “communities of interest.” Despite uncertainties regarding its measurement, the New Mexico Supreme Court summarized justifications for the use of communities of interest quite nicely in *Maestas v. Hall*: “The rationale for giving due weight to clear communities of interest is that to be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents.”⁷⁵

A few states provide clear definitions for communities of interest.⁷⁶ Among the more specific provisions, the Alaska Constitution defines a community of interest as “a relatively integrated socioeconomic area.”⁷⁷ The California Constitution describes a community of interest as a “contiguous population which shares common social and economic interests that should be included within a single district for purposes of fair representation . . . [such as] an urban area, a rural area, an industrial area, or an agricultural area” as well as “areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities,

⁷⁰ *Id.* In this particular case, the court held that the Minnesota redistricting panel properly considered “the number of incumbent conflicts involving female legislators, legislators of the same political party, and legislators of different parties” after complying with federal and state constitutional requirements as well as other “traditional” redistricting criteria. *Id.*

⁷¹ *Id.*

⁷² “As long as constitutional and statutory criteria regarding redistricting are adhered to . . . creating districts to avoid contests between incumbents is a legitimate consideration that may justify minor deviations from equal representation.” *In re Reapportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 337 (1993).

⁷³ *Id.*

⁷⁴ For a potential metric for consideration of communities of interest, see Samuel Wang, Sandra J. Chen, Richard F. Ober, Jr., Bernard Grofman, Kyle T. Barnes & Jonathan R. Cervas, *Turning Communities Of Interest Into A Rigorous Standard For Fair Districting*, STANFORD J. CIV. RIGHTS AND CIV. LIBERTIES (forthcoming 2021), available at https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3828800.

⁷⁵ 274 P.3d 66, 78 (N.M. 2012) (citations omitted).

⁷⁶ Apart from the states set out below, Vermont also provides a definition of community of interest beyond a bare-bones recitation of the phrase. VT. STAT. ANN. tit. 17, § 1903(b)(2) (2018) (“The representative and senatorial districts shall be formed consistent with the following policies insofar as practicable: . . . recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests.”).

⁷⁷ ARK. CONST. art. VI, § 6.

or have access to the same media of communication relevant to the election process.”⁷⁸ Colorado, meanwhile, defines communities of interest in terms of “issues” voters care about, such as issues of education, employment, environment, public health, transportation, water needs, or issues of demonstrable regional significance, which may be the subject of legislation.⁷⁹ Furthermore, Colorado explicitly notes that racial, ethnic, and language minority groups can constitute communities of interest. California and Colorado explicitly prohibit political parties, incumbents, or candidates from factoring into any consideration of what constitutes a community of interest.⁸⁰ Most states⁸¹ leave the term wholly undefined, permitting legislatures and courts to read meaning into the phrase.

There is also precedent for using the concept of communities of interest in the absence of statutory or constitutional language. Alabama and Arkansas give consideration to communities of interest despite no constitutional mandate to do so. Conversely, the New Hampshire Supreme Court has frowned upon attempts to argue that an individual right to have one’s community of interest represented in a districting plan exists.⁸² Maryland has similarly refused to read a communities of interest criteria into the state constitution’s requirement that districts take account of political subdivision boundaries.⁸³

Communities of interest can be cultural or ethnic communities, communities with similar economic concerns, and so on. To name only a few examples of the numerous communities of interest that might exist in any given state, California courts have long recognized Chicano communities of interest. California courts have defined these communities by their “common cultural heritage, traditions, and the Spanish language.”⁸⁴ One court noted that the Chicano

⁷⁸ CAL. CONST. art. XXI, § 2(d)(4). Additionally, several California Commissioners described to members of the Princeton Gerrymandering Project and graduate students at Princeton University’s Woodrow Wilson School of Public and International Affairs that the “public comment” process inherent in California’s independent Citizens Redistricting Commission was a useful tool for defining communities of interest. Thus, litigants can look to public input sessions for information on what considerations may have been made by legislators in creating districts, and whether public input was heeded or disregarded.

⁷⁹ COLO. CONST. amend. Z.

⁸⁰ CAL. CONST. art. XXI, § 2(d)(4) (“Communities of interest shall not include relationships with political parties, incumbents, or political candidates.”); COLO. CONST. amend. Z (“‘Community of interest’ does not include relationships with political parties, incumbents, or political candidates.”).

⁸¹ Thirty-one states require that either their congressional or state legislative districts (or both) be drawn with communities of interest in mind: nine by constitutional provision, eight by statute, the rest by resolutions or guidelines. For examples of states without definitions of the phrase, see, e.g., ARIZ. CONST. art. IV, pt. II, § 1(14)(D) (“District boundaries shall respect communities of interest to the extent practicable . . .”); N.Y. CONST. art. III, § 4 (“The Commission shall consider . . . communities of interest.”). For an example of resolutions adopted by legislatures or guidelines laid out by commissions, see Redistricting Criteria Approved by the Courts, ARK. BOARD OF APPORTIONMENT, <http://www.arkansasredistricting.org/redistricting-criteria> (last visited Oct. 12, 2019).

⁸² See *City of Manchester v. Sec’y of State*, 48 A.3d 864, 878 (N.H. 2012) (holding that “[n]othing in the New Hampshire Constitution requires a redistricting plan to consider ‘communities of interest,’” and that, “although preservation of communities of interest [may be] a legitimate redistricting goal,” it does not mean that there is an individual right to have one’s particular community contained within a district).

⁸³ The Maryland Supreme Court’s hesitancy to recognize a communities of interest criteria stemmed in part from the fact that the court “[thought] it apparent that the number of such communities is virtually unlimited and no reasonable standard could possibly be devised to afford them recognition in the formulation of districts within the required constitutional framework.” *In re Legis. Districting of State*, 475 A.2d 428, 445 (Md. 1984).

⁸⁴ *Castorena v. City of Los Angeles*, 110 Cal. Rptr. 569, 571 (1973).

residents of the district at issue constituted a particularly important community of interest because “discrimination by the ‘Anglo majority’ has forced upon them a community of interest in achieving equal opportunity.... Because the community of interest shared by Chicanos is generally not shared by the ‘dominant surrounding Anglo society,’ Chicanos can achieve their legislative goals only if they have a meaningful opportunity to elect to the City Council persons who will be sensitive to the interests most important” to the community.⁸⁵

A community of interest might also be defined by factors that are more civic in nature. For example, Vermont law requires redistricters to consider “patterns of geography, social interaction, trade, political ties and common interests.”⁸⁶ In one case, the Vermont Supreme Court used this directive to determine whether two towns properly belonged in the same district. To determine whether the towns formed a community of interest, the court looked at the school districts the towns were located in, how connected by roads the towns were, how many residents of one town worked in the other, and whether the towns were served by the same public amenities, among other considerations. Although there were significant differences between the towns, including the fact that one was rural and the other more urban, the court found that they formed a cohesive community of interest. The court supported this finding by noting that the towns used the same hospital and airport and both belonged to administrative governing bodies for Central Vermont, among other things.

The Kansas Supreme Court clearly illustrates the numerous factors that can inform the identification of a community of interest. In a case following the 1991 redistricting cycle, the Kansas court upheld the Kansas redistricting committee’s decision to define communities of interest by factors including urban and rural areas, common standards of living, ethnic groups, use of similar modes of transportation, and so on.⁸⁷ Quoting the redistricting committee, the court acknowledged that any number of districting plans could be best for any number of communities, “but, when the entire state is divided into a specified number of districts, that which may appear ideal for one place or another must be subordinated to the goal of fair and reasonable apportionment of the whole state.”⁸⁸ Although the court recognized the importance of preserving certain communities, it also recognized that these redistricting decisions must be informed by the bigger picture of the entire state’s redistricting plan.⁸⁹

As with all redistricting criteria, a court evaluating whether a redistricting plan properly accounts for communities of interest must weigh communities of interest against other redistricting criteria. Colorado and Michigan courts have each had to balance interests in preserving political subdivision boundaries against the importance of respecting communities of interest. During the 2011 redistricting cycle, the Colorado Supreme Court rejected a districting plan that, according to the state’s redistricting committee, split two counties in order to comply with the federal Voting Rights Act by preserving a Latino community. The court acknowledged that “the Commission appropriately considered these demographics, particularly the growth in

⁸⁵ *Id.* at 571-72.

⁸⁶ VT. STAT. ANN. tit. 17, § 1903(b).

⁸⁷ *In re Stephan*, 836 P.2d 574, 582 (Kan. 1992).

⁸⁸ *Id.*

⁸⁹ *Id.*

the Latino population across the state.”⁹⁰ However, the court held that there was insufficient evidence to demonstrate that the county splits were necessary to avoid violating Section 2 of the VRA and that the Latino communities of interest at issue could be preserved under the proposed plan.⁹¹ The plan’s focus on preserving a community of interest could not trump the state constitution’s directive to respect county boundaries.⁹²

The Michigan Supreme Court has viewed communities of interest as an important part of ensuring that elected officials are responsive to their constituents. The court held that legislators can best represent their constituents and their priorities when “there is some real community of interest among the represented group.”⁹³ Similarly, the court noted that communities of interest can more effectively bring their concerns to their legislators if they are all located in the same legislator’s district.⁹⁴ According to the Michigan court, following county lines in redistricting plans helps accomplish these goals of preserving communities of interest, in turn facilitating responsiveness.

Partisan Considerations (Fairness, Competitiveness, Proportionality)

As a result of the U.S. Supreme Court’s 2019 ruling in Rucho v. Common Cause, federal courts will no longer hear partisan gerrymandering claims.⁹⁵ As a result, state courts may be likely to encounter more of these claims during the 2021 redistricting cycle than they have in the past. The examples below provide just a few ways that state courts have dealt with claims that redistricting improperly favors one political party over the other. Even states that do not have constitutional or statutory language addressing partisan redistricting considerations sometimes disapprove of redistricting plans that ignore traditional redistricting criteria in order to produce a particular partisan advantage.

Determining whether a redistricting plan improperly considers partisan advantage or disadvantage may be a fairly straightforward analysis. For example, in 2015 the Florida Supreme Court found that the state legislature was motivated by partisan considerations in violation of the state constitution when the legislature secretly consulted with partisan operatives to draw its maps.⁹⁶

⁹⁰ In re Colo. Gen. Assembly, 332 P.3d 108, 111 (Colo. 2011).

⁹¹ *Id.* at 111-12.

⁹² *Id.* at 111.

⁹³ In re Apportionment of State Legis., 486 N.W.2d 639, 649 (Mich. 1992).

⁹⁴ *Id.*

⁹⁵ 139 S. Ct. 2484 (2019).

⁹⁶ League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 376 (Fla. 2015). The Florida Supreme Court also once struck down a map that preserved the majority of the old map while simultaneously renumbering state senate districts in order to allow incumbents to serve more terms than they would otherwise be allowed to. In re Senate Joint Resol. of Legis. Apportionment 1176, 83 So. 3d 597, 683 (Fla. 2012). The court was further skeptical of the motives behind the new map because the old map, which the new plan largely preserved, had been drawn before state law prohibited partisan considerations in the redistricting process. *Id.* at 683-84.

Numerous more technical measurements exist to evaluate a redistricting plan's partisan fairness. When using these measurements to evaluate partisan fairness, it is most useful to look at a map as a whole. A single district could favor one political party as a result of party-blind factors such as population distribution or an attempt to honor a community of interest. An unfair advantage to a whole political party across a state can best be identified by examining a map in its entirety.

Partisan fairness encompasses several interrelated concepts. Chief among these are symmetry, responsiveness, and competitiveness. Symmetry is the extent to which the same voter success for both parties translates to the same electoral success. For example, in a state where Republicans won 53 percent of the statewide vote and 9 out of 13 congressional seats, would the same outcome occur for Democrats if they won 53 percent of the statewide vote? If not, then this hypothetical map provides asymmetric opportunities to the two parties.

Responsiveness looks to whether electoral outcomes change with shifting voter preferences. In a responsive map, if a party wins an increased share of votes statewide, its share of legislative seats will also increase. However, if voters of that party have been packed into only a few districts, as occurs in a partisan gerrymander, an increase or decrease in overall votes for that party would not alter the number of seats won. A map that produces that result is not responsive.

Competitiveness is also central to partisan fairness. The smaller the margin of victory in a general election, the more competitive the district. Conversely, if one party consistently wins with a large margin of the vote, the district is not very competitive. The presence of many uncompetitive districts in a state can be an indicator that district lines have been manipulated to ensure partisan advantage or protect incumbents.

In addition to the broader concepts that can indicate whether a map exhibits partisan fairness discussed above, many mathematical measurements exist to evaluate partisan fairness. One way to test if one of the two major parties is being packed into a few districts or cracked across multiple districts is by comparing the average winning vote share for the parties. For example, if Democrats are packed into a few districts, Democrats will win their districts by much higher margins than Republicans will win their (more numerous) districts by. Generally, a partisan gerrymander may be afoot if one party's average winning vote share is significantly larger than the other party's.

Another measurement of partisan fairness is partisan bias. This measurement examines how the parties would be treated if their vote shares were hypothetically split 50-50. In that scenario, one would expect each political party to win an equal number of seats. In a biased map, however, one party will win more seats than its fifty percent share of the vote indicates it should win.

The mean-median difference, yet another measurement, measures the difference between the median district vote share for a party and the mean vote share over all districts for that party. Partisan gerrymandering can make it so that the median district has a substantially different vote from the statewide average, or mean, vote. It is possible through partisan gerrymandering for

more than three-fourths of a state's districts to be above average for one party—an anomalously consistent advantage. If a map treated the two major parties symmetrically, the difference between the mean and median would be close to 0%.

Lastly, the efficiency gap is a measure calculated by taking the number of “wasted” votes a party receives across districts in a given map and dividing it by the total number of votes. Political scientists have defined wasted votes as those cast in a losing election or those cast for winners in excess of the minimum 50 percent (plus one vote) required to win. In any given map, both parties will receive wasted votes; the net difference is used to calculate the efficiency gap. A large efficiency gap could indicate that the map favors one political party over the other. The favored party will be able to win many elections with few wasted votes, while the disfavored party will win only a few elections and large numbers of their votes will be wasted.

The Pennsylvania Constitution's Free and Fair Elections Clause guarantees that “Elections shall be free and equal.”⁹⁷ This clause has proved a promising vehicle for challenging partisan gerrymanders in the Pennsylvania courts. In 2018, the state supreme court struck down the state's congressional and state legislative maps as partisan gerrymanders that violated the free and fair elections clause.⁹⁸ The Pennsylvania Supreme Court held that the clause seeks to ensure that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters.”⁹⁹ The court found that this requires that “all voters have an equal opportunity to translate their votes into representation” without any dilutive effects.¹⁰⁰ In that case, impermissible vote dilution occurred in redistricting plans where Democrats won their congressional districts by large majorities, suggesting packing. Furthermore, Pennsylvania Democrats won close to 50% of the statewide vote in three consecutive election cycles but won only 28% of the state's congressional seats.¹⁰¹ In the face of this relatively stark partisan advantage, the court found that the maps at issue violated the state constitution's free and fair elections clause because they subordinated traditional redistricting criteria in order to favor a political party.¹⁰² Ultimately, the Pennsylvania Supreme Court consciously chose to interpret the free and fair elections clause broadly in order to avoid “the adverse consequences of partisan gerrymandering.”¹⁰³

In 2019, a trial court in North Carolina similarly overturned a state legislative map on the grounds that it was a partisan gerrymander that violated the state constitution's Free Elections Clause.¹⁰⁴ According to that court, the state's 2017 legislative maps “do not permit voters to freely choose their representative, but rather representatives are choosing voters based upon sophisticated partisan sorting. It is not the free will of the People that is fairly ascertained

⁹⁷ PA. CONST. art. I, § 5.

⁹⁸ League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

⁹⁹ *Id.* at 804.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 764, nn. 26-28; Samuel S.-H. Wang, Richard F. Ober, Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 J. CONST. L. 203, 211 (2019).

¹⁰² League of Women Voters, 178 A.3d at 821.

¹⁰³ *Id.* at 814.

¹⁰⁴ Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 03, 2019).

through extreme partisan gerrymandering.”¹⁰⁵ North Carolina’s Free Elections Clause “states that ‘[a]ll elections shall be free.’”¹⁰⁶ Citing state jurisprudence defining the Free Elections Clause stretching back over 100 years, the court found that “extreme partisan gerrymandering . . . depriv[es] citizens of elections that are conducted freely and honestly to ascertain, fairly and truthfully, the will of the people” because, among other things, it effectively allows legislators to entrench themselves in power by choosing their voters, depriving voters of the genuine, fair opportunity to elect their representatives of choice.¹⁰⁷

The North Carolina trial court’s “understanding of the Free Elections Clause [also] shape[d] the application of the Equal Protection Clause, the Freedom of Speech Clause, and the Freedom of Assembly Clause to instances of extreme partisan gerrymandering.”¹⁰⁸ Emphasizing that North Carolina’s Equal Protection Clause provides greater voting rights protections than the federal constitution’s Equal Protection Clause,¹⁰⁹ the court held that partisan gerrymandering “runs afoul of the State’s obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party.”¹¹⁰ Likewise holding that North Carolina’s freedom of speech and assembly clauses can provide separate and stronger protections than the equivalent provisions in the federal constitution, the court noted that voting for one’s preferred candidates is political speech that lies at the core of the type of expression protected by these constitutional clauses.¹¹¹ North Carolina’s gerrymandered districts infringed on this right by singling out Democratic voters’ speech and rendering it “less effective” because of Republican mapmakers’ disagreement with Democratic voters’ viewpoints.¹¹² The court also held that “banding together with likeminded citizens in a political party is a form of protected association” violated by extreme partisan gerrymanders like the one in this case.¹¹³

This case demonstrates the intersection of multiple clauses of North Carolina’s state constitution. The analysis undertaken by that court could be relevant in other states with similar constitutional clauses as courts in those states hear partisan gerrymandering claims.

The Florida Constitution prohibits drawing congressional and state legislative districts “with the intent to favor or disfavor a political party.”¹¹⁴ The Florida Supreme Court has specified that, when a redistricting plan is undertaken with improper partisan intent, the legislature should not be afforded deference by the court; the burden must “shift[] to the Legislature to justify its decisions in drawing the congressional district lines.”¹¹⁵ Any amount of

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *Id.* at *3 (citing N.C. CONST. art. I, § 10).

¹⁰⁷ *Id.* at *110.

¹⁰⁸ *Id.* at *3 (citations omitted).

¹⁰⁹ North Carolina’s Equal Protection Clause has been interpreted to guarantee “substantially equal voting power” to all North Carolinians. *Id.* at *113.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *119.

¹¹² *Id.* at *120-22.

¹¹³ *Id.* at *120.

¹¹⁴ FLA. CONST. art. III, § 20(a).

¹¹⁵ League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 371 (Fla. 2015).

partisan intent in the redistricting process is enough to render a plan unconstitutional.¹¹⁶ The Florida court has been receptive to direct and circumstantial evidence surrounding the entire redistricting process when determining whether the constitution's prohibition on partisan favoritism has been violated, engaging in a totality of the circumstances-like analysis.¹¹⁷

The Ohio Supreme Court, meanwhile, has held that “partisan considerations cannot prevail” over the redistricting criteria listed in the state constitution.¹¹⁸ Although Ohio's constitution contains no provisions regarding partisan considerations, state courts have and might continue to encounter partisan gerrymandering claims. In litigation following the 2011 redistricting cycle, the court found that the Ohio Apportionment Board was not barred from “considering political factors” after all other legal and constitutional criteria were complied with.¹¹⁹ In that case, the court focused on the fact that the Apportionment Board complied with constitutional directives to preserve the boundaries of previous legislative districts and avoid splitting political subdivisions.¹²⁰ Because the Apportionment Board's plan complied with these criteria, the court held that the Board did not err when it also considered political factors.

The Ohio constitution's new provision forbidding favoring or disfavoring a political party and requiring the number of Democratic and Republican districts in the state to be proportionate to the preferences of Ohio voters will govern the 2021 redistricting cycle.¹²¹ This may alter the litigation landscape significantly in Ohio, as earlier cases recognized the possibility of improperly partisan redistricting processes even as they held that districts need not be politically neutral; now that Ohio's process is required to be politically neutral, these claims may find stronger footing in Ohio.

Although not contained in the state constitution or statutes, the Oklahoma Supreme Court has been receptive to considering competitiveness in redistricting plans.¹²² Missouri also recently added provisions to its constitution dictating how partisan fairness and competitiveness should figure in redistricting. However, these are recent additions to the state constitution and have not been fleshed out in litigation yet.¹²³

¹¹⁶ *Id.* at 375.

¹¹⁷ *Id.* at 375-76.

¹¹⁸ *Wilson v. Kasich*, 981 N.E.2d 814, 820 (Ohio 2012) (“As long as the 2011 apportionment plan satisfied the constitutional requirements set forth in Article XI, respondents were not precluded from considering political factors in drafting it.”).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 825-27.

¹²¹ OHIO CONST. art. XI, § 6.

¹²² The Oklahoma Supreme Court recognizes competitiveness as an important way to further responsiveness between elected officials and their constituents. The court agreed with experts involved in a 2002 case, explaining that “‘Competitive districts,’ ... are ‘responsive,’ that is, they allow for the ability of voters to express changed opinions. When voter preferences change, it is more likely their representation will change.” *Alexander v. Taylor*, 51 P.3d 1204, 1212 (Okla. 2002).

¹²³ Missouri's constitution now defines partisan fairness as follows: “parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.” MO. CONST. art. III, § 3(b)(5). This provision says that the efficiency gap between the two parties receiving the most votes in the previous three Senate, gubernatorial, and presidential elections must not exceed fifteen percent. Regarding competitiveness, the state constitution says that “‘Competitiveness’ means that parties' legislative representation shall be substantially and

The Court of Appeals of Maryland has effectively read a prohibition on partisan gerrymandering into its constitutional compactness requirement. It has noted that “the compactness requirement in state constitutions is intended to prevent political gerrymandering.”¹²⁴ According to that court, irregularly shaped, non-compact districts are not per se indicative of improper partisan influence on the redistricting process, but the court seemed willing to consider “an affirmative showing . . . that such districts were intentionally so drawn to produce an unfair political result.”¹²⁵

State-based Minority Protections

As discussed above, racial gerrymandering is often of significant concern during the redistricting process. Although redistricting has occurred in many states to some degree since the last decennial census, the 2021 redistricting cycle is the first wholesale redistricting cycle to be undertaken with brand new Census data since the Supreme Court’s 2013 case Shelby County v. Holder, which eliminated federal oversight of the redistricting process in many states through preclearance. Since 2013, the Supreme Court has demonstrated reticence to involve itself in redistricting and other voting rights disputes: Rucho v. Common Cause held that partisan gerrymandering claims cannot be brought in federal courts, and Brnovich v. DNC could make it increasingly difficult to bring vote denial claims in federal court. Although the effect of Brnovich on redistricting and vote dilution cases is unclear,¹²⁶ it is possible, if not likely, that racial gerrymandering cases will follow expected trends of other election law cases and begin to appear in state court instead of federal court with increasing frequency. In light of these legal developments since the 2011 redistricting cycle, this section of this guide examines the few states that have state-level versions of the Voting Rights Act, as well as states that have effectively read prohibitions on racial gerrymandering or other minority protections into state redistricting law. These considerations may come in handy if you find yourself facing a racial gerrymandering claim brought under your state’s law.

State-Level Voting Rights Acts

California, Oregon, and Washington have state-level Voting Rights Acts. The Oregon and Washington statutes are new and have not been fleshed out in litigation yet.¹²⁷ Oregon’s law

similarly responsive to shifts in the electorate’s preferences.... To promote competitiveness, the electoral performance index shall be used to simulate elections in which the hypothetical statewide vote shifts by one percent, two percent, three percent, four percent, and five percent in favor of each party.” *Id.* Again, the efficiency gap must not exceed fifteen percent in those “simulated elections.” *Id.*

¹²⁴ In re Legis. Districting of State, 475 A.2d 428, 443 (Md. 1984).

¹²⁵ *Id.*

¹²⁶ Brnovich dealt with a vote denial claim under Section 2 of the Voting Rights Act and did not present any questions related to gerrymandering.

¹²⁷ The Oregon statute reads: “Elections for school district or community college district officials “may not be conducted in a manner that impairs the ability of members of a protected class to have an equal opportunity to elect candidates of their choice or an equal opportunity to influence the outcome of an election as a result of the dilution

applies to elections for school and community college districts. Washington’s law covers local, but not statewide, elections.

California’s equivalent of the Voting Rights Act (the CVRA) is older than those found in other states, and thus some caselaw regarding its application has developed. California’s law states that “An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class.”¹²⁸ In recent years, California courts have confirmed that analysis of a redistricting plan under the CVRA is largely the same as the federal Gingles (and Senate factors) VRA analysis.¹²⁹ Proof of discriminatory intent is not required. Unlike in a federal VRA analysis, though, California courts have held that a protected class need not demonstrate that “a compact minority-majority district is possible” to bring a claim under the CVRA.¹³⁰ Courts may impose crossover or coalition districts as a remedy under the CVRA.¹³¹

The CVRA survived a constitutional challenge in a state court of appeals. The court found that the CVRA does not confer any benefit or burden based on race, nor did it burden the right to vote.¹³² Thus, it was subject to rational basis review. The court found the government had a legitimate interest in curing vote dilution and that the private right of action created by the CVRA was rationally related to that interest.¹³³

Florida’s constitution provides that congressional districts may not “be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to

or abridgment of the rights of electors who are members of that protected class...” OR. REV. STAT. ANN. § 255.405 (West). Washington’s law reads: ““no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes.” WASH. REV. CODE ANN. § 29A.92.020 (West). Like legal analysis under the federal Voting Rights Act, both Oregon and Washington looked to factors including polarized voting among minority protected classes and the majority and a history of discrimination to determine whether violations of these laws occurred. Neither state required proof of discriminatory intent to demonstrate a violation of these statutes.

¹²⁸ CAL. ELEC. CODE § 14027 (West). To be liable for imposing or applying a method of elections that results in vote dilution under the CVRA, a defendant must take some affirmative action with respect to the way elections are conducted. *Rey v. Madera Unified Sch. Dist.*, 138 Cal. Rptr. 3d 192, 201 (Cal. Dist. Ct. App. 2012) (holding that a school district board did not violate the CVRA when it had no duty to change its election system sua sponte and when its members were elected by at-large elections implemented before the CVRA was enacted that did not cause vote dilution at the time the at-large elections were implemented).

¹²⁹ See *Yumori-Kaku v. Santa Clara*, 273 Cal. Rptr. 3d 437, 444-45 (Cal. Dist. Ct. App. 2020). In 2020, a California court of appeals held that a plaintiff alleging vote dilution has occurred must demonstrate that “[S]ome mechanism [must have] improperly diluted minority voting power.” *Pico Neighborhood Assoc. v. Santa Monica*, 265 Cal. Rptr. 3d 530, 546 (Cal. Dist. Ct. App. 2020). The court held that plaintiffs requesting a change to a districting plan must show that “the change is likely to make a difference in what counts in a democracy: electoral results.” *Id.* at 550. However, the California Supreme Court granted review of this case in October 2020 and ordered the lower court’s opinion to be republished. This case seems to be an outlier among other California courts’ treatment of CVRA vote dilution claims.

¹³⁰ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 828 (Cal. Dist. Ct. App. 2006).

¹³¹ *Id.* at 829.

¹³² *Id.* at 837.

¹³³ *Id.* at 837-38.

participate in the political process or to diminish their ability to elect representatives of their choice.”¹³⁴ This is a “tier one” standard under Florida redistricting law. If a redistricting plan violates a tier one standard, the court will not defer to the plan unless the legislature can justify its decisions behind the plan.¹³⁵

State Constitutional and Statutory Provisions

While the majority of states do not have state-level voting rights acts, some have constitutional provisions or statutes that have been used to preserve minority communities in redistricting plans. These statutes do not always explicitly protect against minority vote dilution or denial, but courts have sometimes read such protections into them. Some of these state statutes apply only in limited contexts, but they may provide useful examples of how state courts might analyze vote dilution and racial gerrymandering claims.

Colorado’s constitution now includes a provision that tracks the language of the Voting Rights Act.¹³⁶ However, this is a recent addition to the Colorado constitution. Before Colorado added this language to their constitution, state law required the redistricting process to preserve “communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors.”¹³⁷ Cases brought under this provision sometimes successfully persuaded courts to keep racial minority groups together in districting plans under a community of interest rationale. Under this provision, the Colorado Supreme Court in 2002 upheld a redistricting plan that removed three counties from the state’s western mountain region into a district with counties from slightly further east in order to keep other counties in the western district that would preserve a Hispanic community.¹³⁸ Although Colorado’s new voting rights act-like language will govern future redistricting cases involving racial minority communities in the state moving forward, this case demonstrates how a state law requiring the preservation of communities of interest could play a role in protecting minority communities against vote dilution.

The Alaska constitution contains an Equal Protection Clause that, among other things, prohibits discrimination and vote dilution based on geographic area. Courts have not read this provision to explicitly protect racial minorities, but the Alaska Supreme Court has held that the clause provides stronger protections in the redistricting context than the federal Equal Protection Clause.¹³⁹ Alaska law also requires redistricting plans to preserve integrated socio-economic communities. This provision does not explicitly mention race, either, but it has been used to preserve indigenous communities in Alaska and to account for the differences between distinct

¹³⁴ FLA. CONST. art. III, § 20(a).

¹³⁵ League of Women Voters of Fla. v. Detzner, 179 So.3d 258, 264-65 (Fla. 2015).

¹³⁶ For congressional and state legislative districts, the Colorado constitution provides that a map cannot be approved if it was “drawn for the purpose of or results in the denial or abridgement of the right of any citizen to vote on account of that person’s race or membership in a language minority group, including diluting the impact of that racial or language minority group’s electoral influence.” COLO. CONST. art. V, § 44.3(4)(b); 48.1(4)(b).

¹³⁷ COLO. CONST. art. V, § 47 (amended 2018).

¹³⁸ Beauprez v. Avalos, 42 P.3d 642, 652-53 (Colo. 2002).

¹³⁹ Kenai Peninsula Borough v. State, 743 P.2d 1352, 1371 (Alaska 1987); Hickel v. Se. Conf., 846 P.2d 38, 49 (Alaska 1992).

indigenous communities that favor giving each community their own district instead of combining them into one district.¹⁴⁰ In a 1987 case, the Alaska Supreme Court explained that the Alaska Equal Protection Clause ensures “an equally geographically effective or powerful vote.”¹⁴¹ The court held that this is “not a fundamental right, [but] represent[s] a significant constitutional interest.”¹⁴² That case did not deal with a minority vote dilution claim, but rather a claim that the city of Anchorage was discriminated against under a redistricting plan that sought to deprive it of an additional state senate seat.

In 1992, the Alaska Supreme Court used the state Equal Protection Clause to preserve distinct Indian communities of interest in a redistricting plan. In that case, the court struck down a district plan that combined two separate, distinct rural and urban indigenous communities with little in common culturally, economically, or historically into the same district, holding that it made more sense to put each of these communities in its own district to more effectively pursue their distinct interests and concerns.¹⁴³ The Alaska Equal Protection Clause’s requirement that districts be socioeconomically integrated provided the rationale for this holding.

¹⁴⁰ See generally *Hickel*, 846 P.2d 38.

¹⁴¹ *Kenai*, 743 P.2d at 1372.

¹⁴² *Id.*

¹⁴³ *Hickel*, 846 P.2d at 53-54.

Conclusion

In sum, the task before you is a grand one. There are numerous criteria that maps must comply with and numerous sources of law from which guidelines can be derived. But the task is an important one, because these district lines and the maps they create are the basis for one of the bedrock guarantees of our nation - representative democracy. State courts across the country will be struggling with the same questions you are and we hope this Guide has been of use in providing examples of approaches that other states have taken when considering their district maps, as well as some basic understandings of the metrics that can be used to determine compliance with redistricting criteria. We can learn a lot from one another in working to ensure that the maps drawn in 2021 and 2022 shore up our government's guarantee that every voter's voice will be heard in helping to elect their representatives for the next decade.

Appendix

Contiguity

State	Statutory/Constitutional Provision	Quote	Notes
Alaska		“Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.” <u>Hickel v. Se. Conf.</u>, 846 P.2d 38, 45 (Alaska 1992).	Districts containing portions of “open sea.” Integrating contiguity with compactness and socioeconomic communities of interest.
Kansas		“[A]ll courts generally agree that lack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification. The area of a	Lack of contiguity is an indicator of political gerrymandering or other discrimination and requires special justification. Single corridor contiguity.

		congressional district should be reasonably contiguous and compact under a proper apportionment plan and, if not, a satisfactory explanation should be given by the proponents of the plan so as to remove any question of gerrymandering and invidious discrimination. The obvious explanation in the present instance is that the area was all part of a single voting precinct and had to be placed in one representative district for voting purposes. In addition the areas are joined by a strip of land 420 feet wide and 660 feet long and no claim or showing of gerrymandering or discrimination has been made.” <u>Petition of House Bill No. 2620</u>, 595 P.2d 334, 341 (Kan. 1979).	
Kentucky		“Section 33 provides in part that ‘the counties forming a district shall be contiguous.’ The appellants argue that under this provision, if a district includes parts of counties then those parts must be contiguous with the rest of the district. District 18, which runs through Fort Knox, violates this requirement, the appellants insist, because the federal enclave divides it into non-contiguous eastern and western portions. . . . The United States Supreme Court, however, has long since discarded this notion of a federal state within a state. Federal enclaves, even those as completely ceded as Fort Knox, do not cease to be geographical parts of the states and counties that contain them. The appellants do not contend	Federal enclaves within states.

		that the constitutional ‘contiguity’ requirement refers to anything other than physical or geographical contiguity. District 18 is geographically contiguous, notwithstanding the fact that Fort Knox is jurisdictionally distinct and may preclude intra-district travel from one end of the district to the other.” <u>Watland v. Ky. State Bd. of Elections</u>, 2005 WL 1125070, at *2 (Ky. Ct. App., May 13, 2005).	
Maine		“[D]istrict 58 is horseshoe-shaped, involving parts of three counties, and two of its five towns are contiguous only at a single point ‘in the woods.’ While we agree that district 58 may approach the limits of what is constitutionally permissible under the state compactness-and-contiguity test, that district does not of itself show that the Legislature exercised improper judgment in reconciling the several state constitutional requirements.... While the configuration of district 58 as enacted is unfortunate, we see no indication in this record that it, or a district substantially similar to it, is anything other than a product of the balancing process required by the Maine Constitution.” <u>In re 1983 Legislative Apportionment of House, Senate, and Congressional Districts</u>, 469 A.2d 819, 831 (Me. 1983).	Single point contiguity.
New York		“Petitioners cite us to numerous examples of allegedly noncontiguous districts, many of which	

		are located on or near bodies of water. However, the requirement of contiguity is not necessarily violated because a part of a district is divided by water. Moreover, in none of the cited examples is it necessary to travel through an adjoining district to keep within the boundaries of the challenged district.” <u>Schneider v. Rockefeller</u>, 293 N.E.2d 67, 72 (N.Y. 1972) (citations omitted).	
--	--	---	--

Compactness

State	Provision	Quote	Notes
California		“We endorse the Masters’ thesis that in designing districts, ‘Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city.’” <u>Wilson v. Eu</u>, 823 P.2d 545, 553 (Cal. 1992).	Compactness’s relationship to political responsiveness and communities of interest.

Colorado		“[C]ompactness, seeks to promote ‘fair and effective representation’ by implicitly recognizing that the more densely located a representative’s constituents, the easier it is to travel across and to physically engage with the district. Given the priority of equal population and the variable population distribution throughout Colorado, our districts will never be of comparable physical size.... Instead, an adopted map should be reviewed for compactness as compared with previous district lines and competing map proposals to ensure that the map-drawing process has not been tainted by ‘partisan gerrymandering.’” <u>Hall v. Moreno</u>, P.3d 961, 972 (Colo. 2012) (citations omitted).	
Illinois		“It is possible to establish a mathematically precise standard of compactness.... However, we find it unnecessary to adopt such a procedure in this case.... A visual examination of Representative District 89 reveals a tortured, extremely elongated form which is not compact in any sense. (See the following map.) Nor were the plaintiffs able to advance any reason which might possibly justify such a radical departure from the constitutional requirement of compactness in this case.” <u>Schrage v. State Bd. of Elections</u>, 430 N.E.2d 483, 487 (Ill. 1981).	Use of the “eye test”

Maryland		“Clearly, the State's geography inhibits the geometric fashioning of districts of symmetrical compactness and it was hardly the purpose of the compactness requirement to promote aesthetically pleasing district configuration forms. We therefore think it obvious that a mathematical formulation for determining whether a particular district is unconstitutionally noncompact was not within the contemplation of the constitutional framers when proposing adoption of § 4 of Article III of the Maryland Constitution. As the cases so plainly indicate, the compactness requirement in state constitutions is intended to prevent political gerrymandering. Oddly shaped or irregularly sized districts of themselves do not, therefore, ordinarily constitute evidence of gerrymandering and noncompactness. On the contrary, an affirmative showing is ordinarily required to demonstrate that such districts were intentionally so drawn to produce an unfair political result, that is, to dilute or enhance the voting strength of discrete groups for partisan political advantage or other impermissible purposes. Thus, irregularity of shape or size of a district is not a litmus test proving violation of the compactness requirement. We are essentially in agreement with those cases which view compactness as a requirement for a close union of territory (conducive to constituent-representative communication), rather than as a requirement which is dependent upon a district being of any particular shape or size.”	Refusing to adopt a mathematical test for compactness. Compactness’s relationship to political responsiveness, partisan gerrymandering, and other forms of discrimination and vote dilution.
----------	--	--	---

		<u>Matter of Legis. Districting of State</u> , 475 A.2d 428, 442-43 (Md. 1984).	
New Jersey		“[W]here districts are created on the basis of existing political subdivisions, compactness becomes a much reduced factor.” <u>Davenport v. Apportionment Comm'n</u>, 319 A.2d 718, 722 (N.J. 1974)	Priority of compactness relative to other criteria including the preservation of political subdivisions.
Rhode Island		“While a division into tightly packed districts with regular lines might literally satisfy the constitutional requirement, our state with its irregular boundaries, its bays and its inlets, its islands, its rivers and lakes and its many other geographical features is obviously not susceptible to being divided into circular planes or squares. Moreover, the overriding requirement that the districts must be as nearly equal in population as possible would prevent the accomplishment of any such division. The term ‘compact’ then, as it is used in the constitution, has reference to a principle, rather than to a definition, and has meaning only within an appropriate factual context. Its origins as a constitutional requirement lie in an intention to provide an electorate with effective representation rather than with a design to establish an orderly and symmetrical geometric pattern of electoral districts. Undoubtedly a principal inducing factor for its adoption was the desire to avoid the political gerrymander.”	

		<u>Opinion to the Governor</u> , 221 A.2d 799, 802 (R.I. 1966).	
Vermont		“[C]ompactness and contiguity requirements ultimately concern ‘the ability of citizens to relate to each other and their representatives and ... the ability of representatives to relate effectively to their constituency.’ These relationships are fostered through shared interests and membership in a political community. They are undermined, however, when geographic barriers that severely limit communication and transportation within proposed districts are ignored.” <u>In re Reapportionment of Towns of Hartland, Windsor & W. Windsor</u>, 624 A.2d 323, 330–31 (Vt. 1993) (citations omitted).	

Political Subdivision Boundaries

State	Provision	Quote	Notes
Alabama		“‘[T]he requirements of equal protection necessitate, in some instances, that county lines give way in drawing legislative districts.’” <u>Rice v. English</u>, 835 So.2d 157, 160 (Al. 2002) (citations omitted).	

Connecticut		“We reaffirm that a person challenging a reapportionment plan for violations of the town integrity principle must demonstrate ‘that towns were cut in the adopted plan for reasons other than to meet the federal equal population requirement or that the challenged plan was not the legislature's best judgment in harmonizing the conflicting constitutional requirements.’” <u>Fonfara v. Reapportionment Comm'n</u>, 610 A.2d 153, 159 (Ct. 1992) (citations omitted).	
Kentucky		“Applying these principles, we are not free to disregard the drafters' intent to preserve county integrity by striking the provision from Section 33. We must harmonize the dual mandates to the greatest extent possible while achieving the overarching goal of population equality.” <u>Legis. Research Comm'n v. Fischer</u>, 366 S.W.3d 905, 913 (Ky. 2012).	
Minnesota		“They also respect political subdivisions, which minimizes voter confusion and gives political subdivisions a stronger voice.... Creating districts that respect political subdivisions sometimes results in districts that lack neat and tidy shapes and edges.... Because respecting political subdivisions is a criterion subordinate to the constitutional mandate of substantial population equality, some subdivision splits are inevitable. Where practicable, the panel splits political subdivisions along thoroughfares, rivers,	Intersection with responsiveness and communities of interest and compactness. Articulates a goal for what boundary lines to use when splitting a political subdivision is necessary.

		neighborhood boundaries, or other geographic features.” <u>Hippert v. Ritchie</u>, 813 N.W.2d 374, 382-83 (Minn. 2012).	
Missouri		“Another suggestion of plaintiff is that compactness and equality of population could better be obtained by dividing counties. However, counties are important governmental units, in which the people are accustomed to working together. Therefore, it has always been the policy of this state, in creating districts of more than one county (congressional, judicial or senatorial) to have them composed of entire counties.” <u>Preisler v. Hearn</u>, 362 S.W.2d 552, 556 (Mo. 1962).	
New Jersey		“And with respect to the relationship between political entities and the legislative process, we recognize that today the county and the municipality are not longer [sic] strangers to federal legislation. Nonetheless the county and the municipality are the meaningful units in state-local relations in many more situations, and elections from districts are the more worthwhile if the county and the municipality are reflected in drawing the district lines.” <u>Scrimminger v. Sherwin</u>, 291 A.2d 134, 139 (N.J. 1972)	

New York		“Although we are troubled by the number of divided counties in the new plan and by the four bi-county pairings, it is not appropriate for us to substitute our evaluation of the relevant statistical data for that of the Legislature. We are satisfied that in balancing State and Federal requirements, the respondent has complied with the State Constitution as far as practicable, and we cannot conclude on this record that the Legislature acted in bad faith in approving this redistricting plan.” <u>Wolpoff v. Cuomo</u>, 600 N.E.2d 191, 195 (N.Y. 1992).	
West Virginia		“‘[I]n an effort to adhere as closely as possible to the applicable provisions of the state constitution, the Legislature, in redrawing the senatorial district lines, has ‘[a]dhered to the equality of population concept, while at the same time recognizing ... political subdivision lines’ and further recognizing the fact that government ‘functions, policies and programs of government have been implemented along’ such lines . . . The Legislature ‘[a]lso [took] into account in crossing county lines, to the extent feasible, the community of interests of the people involved.’” <u>State ex rel. Cooper v. Tennant</u>, 730 S.E.2d 368, 393, 395 (W. Va. 2012).	