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When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans

Nathaniel Persily*

* Professor, University of Pennsylvania Law School. Thank you to Jon Burke for help in researching this topic and to Michael Carvin, Jonathan Katz, Luke McLoughlin, and Michael Pitts for helpful comments. I am also grateful to the three courts and associated special masters who have appointed me to draw statewide redistricting plans for New York, Maryland, and Georgia. Needless to say, the opinions expressed here are solely my own and no communications with those courts or information from those cases is included in this article.

Sixty years ago when the Supreme Court first considered a constitutional challenge to a congressional district map, the idea of judges drawing redistricting plans seemed unthinkable. As Justice Felix Frankfurter explained in *Colegrove v. Green*,¹ “[o]f course no court can affirmatively re-map . . . districts so as to bring them more into conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid.”² As much as the topic of redistricting itself may have seemed an invitation into the political thicket, no thicket was thought to be thicker than the one that might ensnare a court tasked with the daunting job of actually drawing a districting plan itself.

My, how times have changed. In the many redistricting struggles that now follow each census, plaintiffs routinely turn to the courts not only to strike down plans as illegal, but also to draw remedial plans to take their place. Courts are not mere referees of the redistricting process; they have become active players, often placed in the uncomfortable role of determining winners and losers in redistricting, and therefore, by consequence, elections. However, judges will learn very few lessons from the relevant caselaw or secondary literature that can guide them when they are placed in the position of drawing their own plans. Consequently, the remarkable variation in process and substance of court-supervised redistricting efforts should come as little surprise.

This essay attempts to describe the lay of the land for court-drawn redistricting plans and offers some direction as to the principles courts might want to follow in the future. Part I describes the applicable law, Part II sets forth the procedures involved in a court-supervised redistricting effort, and Part III describes substantive decisions that courts must make when crafting the plan.

My goal with this essay is less to argue for one particular set of procedures or substantive guidelines, than it is to describe the costs and benefits of various approaches. Although uniform guidelines are sorely needed to provide ground rules for court plans, the unique context in which a court intervenes will usually influence a plan more than will the universal factors that confront every court that draws a new map. With that said, much can be gained by recognizing the hurdles that each court inevitably faces; even if by necessity, they must jump over them in different ways.

I. Unique Legal Constraints

As a threshold matter, court-drawn plans must comply with the law, of course. However, the legal constraints on a court-drawn plan differ somewhat from those applicable to a legislative plan. Some of these constraints are more stringent for court-drawn plans while others are less so, and some will depend on whether the court is a federal court or a state court. It is helpful to think of three different categories of constraints: (1) those that are uniquely applicable to court-drawn plans,³ (2) constitutional

¹ *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion)(arguing that redistricting controversies should not be justiciable).

² *Id.* at 553.

³ *See infra* Part I(A).

constraints shared by court-drawn and legislative plans,⁴ and (3) requirements of the Voting Rights Act.⁵

A. First Principles

Courts get involved in the process of line drawing either when the state has failed to construct a map following a census or after the court has declared the state's current plan unconstitutional or otherwise illegal. Although it may seem obvious, it is important to remember that the court's involvement occurs only after someone initiates a lawsuit. The reasons for that suit and the basis for the court's decision will often determine the extent and character of judicial involvement in crafting a remedial plan. However, redistricting litigation is not completely unlike other litigation in that, at its heart, a plaintiff's claim seeks a judicial declaration that some state action—in this case, a law that specifies the boundary lines of districts—violates the Constitution or other legal requirement.

The difference between redistricting and most other litigation, though, is that once the court declares the plan a nullity something needs to be done; specifically, the crafting of a new plan. At the time of *Colegrove* and into the 1960s it appeared to many judges that the only potential remedy for an unconstitutional districting plan was to order at-large elections statewide.⁶ As the caselaw has developed, however, courts now routinely cure the violation discovered in the litigation by crafting their own remedial plan.

1. Deference to the State Redistricting Authority

a. Giving the Legislature a Second Bite at the Apple

Deference to the legislature⁷ is the starting point for judicial involvement in the redistricting process. This general rule of deference manifests itself in different forms throughout the stages of a court's involvement. At the stage of remedying the legal violation discovered in a plan, courts ordinarily will allow the legislature to correct its mistakes to give it a second chance to pass a plan without any of the legal deficiencies the court identified.⁸ This deference flows from the widespread recognition in the caselaw

⁴ See *infra* Part I(B).

⁵ See *infra* Part I(C).

⁶ See *Branch v. Smith*, 538 U.S. 254, 266-70 (2003) (discussing the statutory basis for statewide at large elections and examples of courts in the 1960s that ordered statewide at-large elections for congressional delegations); *Colegrove*, 328 U.S. at 1201.

⁷ When speaking of deference to the "legislature," I am also referring to deference to whatever political body is tasked (usually by the legislature) with the job of crafting redistricting plans. This could be a commission or some other official at the state level, or any number of government entities (city council, county commission, counsel's office) at the local level.

⁸ See, e.g., *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)(quotation omitted):

When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new

that redistricting is a political matter primarily and appropriately entrusted to the political branches. As the Court explained in *Abrams v. Johnson*, “[t]he task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.”⁹

In other words, courts tend to draw their own plans only as a last resort. This general rule has tremendous procedural and substantive implications for the judicial line-drawing process. First, as discussed in Part II, a court is necessarily rushed in constructing a plan if it gives the legislature until the last moment to draw its own plan. Second, the compressed time frame in which a court must operate limits the possible factors it can take into account in crafting the plan. With the luxury of time would come an ability to mediate among the opposing forces that wish to shape the line-drawing process in one way or another. In theory, a court with time on its hands could also repeatedly “improve” its plan after receiving continued input from interested parties. But such deliberation and deal-making is the stuff of the legislative, not the judicial, process. Court-drawn plans, in contrast, are emergency measures adopted to ensure that elections can go forward under some set of legally defensible lines.

b. Deference to State Courts

The general rule of deference to state redistricting policies extends to any state body, including courts, that may be in charge of the process of redrawing districts.¹⁰ The Supreme Court has explicitly held that a federal court may not enjoin or otherwise interfere with a state court in the process of crafting its own redistricting plan¹¹: “Absent evidence that these state branches [including courts] will fail timely to perform that duty a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”¹²

legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. [A] state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.

See also *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (“[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”)(quotation omitted).

⁹ *Abrams v. Johnson*, 521 U.S. 74, 100 (1997). *See also Weiser*, 412 U.S. at 794-95 (quotation and citation omitted):

From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. . . . We have adhered to the view that state legislatures have ‘primary jurisdiction’ over legislative reapportionment.

¹⁰ *Grove v. Emison*, 507 U.S. 25, 33 (1993) (“In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.”).

¹¹ *Id.*

¹² *Id.* at 34.

Thus, in a race between courts to redistrict, the state court will win if it constructs a legal plan in time for use in the upcoming election. Indeed, a race to different courts (or more specifically, forum shopping) is often what this rule of deference will promote. Those who believe that the available state court might craft a more favorable plan than would a prospective or currently involved federal court will do what they can to ensure a state court hears the case. As a result, occasionally both state and federal courts will draw plans at the same time. Although the state court plan must win if done in a timely fashion,¹³ unique legal constraints that apply to state court plans but not federal plans, such as the preclearance requirements of Section Five of the Voting Rights Act,¹⁴ can delay a state court plan long enough that the federal plan must then go into effect.¹⁵

c. Deference to State Policies

The deference due the state legislature does not end once a court reluctantly gets involved in line-drawing. Rather, according to the rules set forth in *Upham v. Seamon*,¹⁶ a federal court plan ought to reflect the policy decisions made by the legislature even though the legislature has abdicated its responsibility to redistrict.

Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of reconciling the requirements of the Constitution with the goals of state political policy. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.¹⁷

Upham built on the Supreme Court's decision in *White v. Weiser*,¹⁸ which held that:

[A] federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to

¹³ See *id.* at 33-34.

¹⁴ See *infra* Part I(C).

¹⁵ See *Branch v. Smith*, 538 U.S. 254 (2003).

¹⁶ *Upham v. Seamon*, 456 U.S. 37, 41 (1982)(internal quotations omitted).

¹⁷ *Id.* at 43 (quotations omitted). See also *Johnson v. Miller* (Johnson II), 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (finding that a minimum change plan acts as a surrogate for the intent of the state legislative body); *Stephan v. Graves*, 796 F. Supp. 468, 470 (D. Kan. 1992) (noting that the court's goal should be to adopt a plan that comes the closest to deferring to the state legislature's will, as expressed in the unconstitutional plan, and intrudes on state policy as little as possible); *Balderas v. Texas* (Balderas I), 2001 U.S. Dist. LEXIS 25006, at *6-7, *11 (E.D. Tex. Nov. 28, 2001) (holding that court modifications must be limited to those necessary to cure the statutory or constitutional defects in a state's plan).

¹⁸ *White v. Weiser*, 412 U.S. 783 (1973).

state policy does not detract from the requirements of the Federal Constitution.¹⁹

As emphatic as the Supreme Court's pronouncements concerning deference to state policies have been, on just a few occasions, none of which occurred in the past two decades, has the Court overturned a map because the crafting-court did not defer sufficiently to state redistricting policies.²⁰ Perhaps this is because courts usually adopt what might be described as "least-change" plans; that is, plans that remedy the identified constitutional violation but go no further.²¹ Or perhaps the success of court-drawn plans derives from the difficulties inherent in discerning whether a non-deferential plan went *too far*, or from the sympathy the Supreme Court has for a lower court that must rush to put a plan in place before upcoming elections.²² Moreover, in most cases where a court radically redraws a plan, it does so because the underlying legal violation is so pervasive

¹⁹ *Id.* at 795. See *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution of the Voting Rights Act."). See also *Connor v. Finch*, 431 U.S. at 414-415 (internal quotations omitted):

We have repeatedly emphasized that legislative reapportionment is primarily a matter for legislative consideration and determination, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies. . . . The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination.

²⁰ See *Upham*, 456 U.S. at 44 (overturning remedial plan that remedied a two-district violation by redrawing the entire state plan); *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971) (overturning court plan that unnecessarily eliminated multimember district). One could add *Connor v. Johnson* to the list of overturned nondeferential plans, except that it is unclear whether the Supreme Court stayed the district court's plan because it did not defer to the state plans that used single member districts, or because its plan violated the general norm for court-drawn plans against the use of multimember districts. See *Connor v. Johnson*, 402 U.S. at 693 (staying district court plan that used multimember districts rather than single member districts); see also *infra* notes 32-44, and accompanying text. *White v. Weiser* is also a potential candidate, although it is unclear whether the Court struck down the district court's plan because it was more malapportioned than others before it or because it did not defer to state policies concerning avoiding incumbent pairings and preserving districts. See *White*, 412 U.S. at 794-95, 797. Of course, the Supreme Court has overturned court-drawn plans for other reasons, such as violating the one-person, one-vote rule. See, e.g., *Connor v. Finch*, 431 U.S. 407, 425-26 (1977) (overturning malapportioned court plan that deferred to state's historic practice of keeping political subdivisions together); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (same).

²¹ See DAVID BUTLER AND BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES, 111-12. See also *Johnson II*, 922 F. Supp. at 1559; *Stephan*, 796 F. Supp. at 470; *Balderas I*, 2001 U.S. Dist. LEXIS 25006, at *6-7, *11.

²² See, e.g., *Mahan v. Howell*, 410 U.S. 315, 333 (1973) (emphasizing the difficulty of a rushed court created plan).

(as in a wildly malapportioned plan) that the court cannot replace the illegal plan with one that merely nips at the edges.

If taken seriously, though, the idea of deference to state policies can be a sticky wicket. In the typical case, such deference could extend to traditional, though not legally required, districting principles such as compactness, contiguity, retaining the cores of prior districts, respecting political subdivision boundaries, and protecting communities of interest.²³ But many states also have long traditions of nefarious conduct, such as malapportionment or racial discrimination, which the Supreme Court has made clear courts cannot respect. Beyond these, however, are all policies—even those that serve the narrow interests of the original linedrawers—deserving of deference so long as they are not illegal or unconstitutional? In particular, should the court defer to the partisan or incumbency related motives underlying the enjoined plan?

In *White v. Weiser*, the Supreme Court came quite close to saying outright that a court should defer to a state policy of avoiding contests between incumbents.²⁴ Several lower courts have followed the lead of that decision and explicitly incorporated incumbent protection concerns into their plan.²⁵ As discussed later, courts that take account of incumbency do so in order to preserve the constituency-representative relationship that existed under the enjoined plan,²⁶ and to avoid charges that its plan is biased against one party.²⁷ However, in protecting all incumbents equally, a court plan

²³ See *infra* Part III(A).

²⁴ *White*, 412 U.S. at 797:

But here, the District Court did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable. We repeat what we have said in the context of state legislative reapportionment: “The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.” (footnote omitted).

Justice Thurgood Marshall submitted a separate opinion in *White v. Weiser* disagreeing on this point and emphasizing that “the judicial remedial process in the reapportionment area—as in any area—should be a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative apportionment.” *Id.* at 799 (Marshall, J., concurring in part). See also *Bush v. Vera*, 517 U.S. 952, 964 (1996) (“We have recognized incumbency protection, at least in the form of avoiding contests between incumbents, as a legitimate state goal.”).

²⁵ See *Johnson II*, 922 F. Supp. at 1565 (finding that the protection of incumbents was a legitimate consideration for a court-drawn plan); *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 647 (D.S.C. 2002) (finding incumbent protection to be a traditional state interest in South Carolina).

²⁶ See, e.g., *Arizonans for Fair Representation v. Symington*, 828 F.Supp. 684, 688-89 (D.Ariz. 1992) (three-judge court):

The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering. (citation omitted)

²⁷ See, e.g., *Prosser v. Elections Bd.*, 793 F.Supp. 859, 871 (W.D.Wis. 1992) (discussing the court plan’s lack of incumbent pairings and the correlative avoidance of “perturbation in the political balance of the state”).

will also diminish electoral competition and codify the partisan bias of the underlying plan.²⁸

No court has yet found an unconstitutional partisan gerrymander,²⁹ and most judges admit to the inevitability of partisanship influencing, if not dominating, plans crafted by politicians. Although a court might not strike down a plan because of excessive partisanship, some judges are naturally hesitant to institute a court plan that consecrates or acquiesces to the partisan motives that underlie the districts in the struck-down plan. After all, the Supreme Court has admonished courts that their redistricting plans should be drafted “in a manner free from any taint of arbitrariness or discrimination.”³⁰ Consequently, the impulses of deference and political neutrality run counter to each other. For the most part, however, courts opt for deference and leave for another day³¹ the question of whether the deferential remedial plan is too partisan, or too incumbent friendly, in its effect.

2. Preference for Single Member Districts

On several occasions the Supreme Court has emphasized that court-drawn plans should employ single-member, as opposed to multimember, districts.³² This admonition can best be described as a rule the Court has given to lower courts acting in their equity capacity to devise remedies for legal violations. In other words, there is certainly no textual support for this preference for multimember over single member districts.³³ Rather, the preference for single over multimember districts comes from the history of courts reluctantly and hurriedly adopting multimember district plans to remedy early

²⁸ Arguably this is what happened in Texas in the 2002 redistricting, in which a federal court adopted a “least-change” plan that kept a majority of the Texas delegation Democratic, despite the fact that Texas is a Republican state. *See* *Balderas v. Texas* (Balderas I), 2001 U.S. Dist. LEXIS 25006, at *13 (E.D. Tex. Nov. 28, 2001). The 2004 Texas re-redistricting went to the opposite extreme, of course, drawing a map that enhanced the Republican advantage in a state. *See* *Session v. Perry*, 298 F. Supp. 2d 451, 498 (E.D. Tex.2004) (per curiam), *judgment vacated and remanded by* *Henderson v. Perry*, 125 S.Ct. 351 (U.S.Tex. Oct 18, 2004).

²⁹ In *Vieth v. Jubilerer*, a fractured Court left open the possibility that it might develop a future test for partisan gerrymanders more stringent than the toothless one of *Davis v. Bandemer*. *Vieth v. Jubilerer*, 541 U.S. 267, 281, 317 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). Perhaps in the upcoming case out of Texas, *Session v. Perry*, the Court will have a chance to clarify the rules on partisan gerrymandering. *See* *Session*, 298 F. Supp. 2d at 498.

³⁰ *Connor v. Finch*, 307 U.S. 407, 415 (8th Cir. 1976). *But cf.* *Fletcher v. Golder*, 959 F.2d 106, 109 (8th Cir. 1992) (upholding court-adopted plan that did not investigate the political motivation underlying the plan or its political consequences).

³¹ That is, the day if and when the Supreme Court develops a coherent standard for partisan gerrymandering.

³² *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (“[A] court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary.”). *See also* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976)(same); *Connor v. Johnson*, 402 U.S. 690, 692 (1971)(same).

³³ Indeed, the Constitution does not mention districting at all and “[i]n colonial days ‘multiple districts were the rule, single ones the exception.’” *Whitcomb v. Chavis*, 403 U.S. 124, 158 n.39 (1971)(quoting Maurice Klain, *A New Look at the Constituencies: The Need for a Recount and Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1112 (1955)).

malapportionment controversies,³⁴ as well as a parallel line of cases in which plaintiffs challenged multi-member districts as diluting minority votes.³⁵

The first opportunity for the Court to state its preference for single member districts was its stay of the district court's plan in *Connor v. Johnson*.³⁶ That plan employed multimember districts for a few counties because the crafting-court said that insufficient time remained before the candidate filing deadline to break up these multimember districts into single member districts (as parties to the litigation had proposed).³⁷ The Supreme Court reversed because it did not believe the claims of the district court (given the fact that, at the time of its decision, the court had before it single member district plans), and because it considered single member districts to be preferable.³⁸ Three years later, in a new incarnation of the same litigation over Mississippi's legislative districts, the Court explained its preference:

Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a "singular combination of unique factors" that justifies a different result.³⁹

In the intervening years the Court had decided *Chapman v. Meier*,⁴⁰ which to this day remains its most complete explanation for the preference for single-member districts.

First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases. Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially

³⁴ See, e.g., *Mahan v. Howell*, 410 U.S. 315, 332-33 (1973). See also *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 731 (1964)(suggesting in the context of a one person, one vote dispute that voters might not like multimember districts).

³⁵ See *Whitcomb*, 403 U.S. at 158-159:

[C]riticism (of multimember districts) is rooted in their winner-take-all aspects, their tendency to submerge minorities and to over-represent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests.

³⁶ *Connor*, 402 U.S. at 692 ("[W]hen district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter.").

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Connor v. Finch*, 431 U.S. 407, 415 (1977)(citation omitted).

⁴⁰ *Chapman v. Meier*, 420 U.S. 1 (1975).

responsible to them. Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts.⁴¹

Given that the most prominent racial vote dilution cases under either the Fourteenth Amendment or the Voting Rights Act have involved multimember districts,⁴² it is hardly surprising to find the Court reluctant to embrace multimember districting as a remedy that lower courts should follow in their redistricting plans. As contemporary scholarship has argued, however, many of the alleged shortcomings of multimember plurality-based systems could be remedied with different types of proportional voting rules.⁴³ In fact, civil rights advocates who were at the forefront of breaking down multimember schemes that diluted minority votes, now urge the adoption of such schemes, modified to dodge what are seen as shortcomings of the single member district system with respect to minority empowerment.⁴⁴

B. Unique Constitutional Constraints on Court Drawn Plans: The Stricter Requirement of Population Equality

All of the constitutional constraints that exist for legislative plans also exist for court-drawn plans; however, the equal population constraint is stricter for court plans. Courts, like legislatures, must make sure that the plan they adopt or construct is not intentionally discriminatory⁴⁵ and does not use race as the predominant factor,⁴⁶ unless necessitated by the Voting Rights Act.⁴⁷ Insofar as one might discern (or the Court might create) a constraint on partisan gerrymandering,⁴⁸ such a prohibition would apply to court-drawn plans as well. For the most part, though, the stricter one-person, one-vote requirement for court-drawn plans is the only notable, and often troublesome, constitutional restriction about which courts concern themselves.

⁴¹ *Id.* at 15-16 (citations and footnote omitted).

⁴² See *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986) (striking down the use of multimember districts under the Voting Rights Act because it diluted minority votes); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (upholding multimember districting scheme against challenge of constitutional vote dilution); *White v. Regester*, 412 U.S. 755, 756 (1972) (striking down multimember districts as “invidiously discriminatory”); *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971) (upholding multimember districting plan against constitutional challenge).

⁴³ See, e.g., Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241; Larry T. Aspin & William K. Hall, *Cumulative Voting and Minority Candidates: An Analysis of the 1991 Peoria City Council Elections*, 225 AM. POL’Y. REV. 225 (1996); Robert Brischetto, *Cumulative Voting as an Alternative to Districting: An Exit Survey of Sixteen Texas Communities*, NAT’L CIVIC REV., Sept. 22, 1995, at 347-54; Richard Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989).

⁴⁴ See, e.g., LANI GUINIER, NO TWO SEATS: THE ELUSIVE QUEST FOR POLITICAL EQUALITY, 77 VA. L. REV. 1413 (1991); LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

⁴⁵ See *Bolden*, 446 U.S. at 62.

⁴⁶ See *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

⁴⁷ See *Bush v. Vera*, 517 U.S. 952, 976 (1996); *Miller*, 515 U.S. at 921; *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

⁴⁸ See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

As with plans devised by the legislature, the equal population requirements for court-drawn congressional plans are stricter than those for non-congressional plans.⁴⁹ Congressional plans must make a good faith effort to achieve precise mathematical equality,⁵⁰ but courts will allow the legislature to depart from mathematical equality in other redistricting plans. Although courts will tend to uphold most non-congressional plans drawn by the legislature with overall deviations under ten percent that can be justified by some legitimate state interest,⁵¹ court-drawn plans must abide by a stricter standard of population equality.⁵² Alas, the Court has not identified with precision exactly what percentage deviation the Equal Protection Clause allows or prohibits for court-drawn non-congressional plans; all we know is that courts should pay greater attention than legislatures to the equal population requirement. As the Court has explained on several occasions, “unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation.”⁵³ This tighter leash around courts’ necks derives from the fact that they are not in the best institutional position to decide on state policies that might justify departures from one-person, one-vote.⁵⁴

The strict rule of population equality illustrates the general lack of other guiding principles for court-drawn plans. Put differently, the Court has expressed very little of what might be considered a coherent philosophy of representation, but it knows one thing: districts should have equal numbers of people in them. Thus, that confidence in the conviction of the equal population requirement leads naturally to courts’ attempts to perfect that requirement at the expense of other interests in which they are less expert.

The stricter the rule of population equality constraining a plan, the longer it will take to construct it, and the less attention will be paid to other redistricting principles. Mapmakers can spend an enormous amount of time “zeroing out” a plan; that is, adding and subtracting census blocks from districts in order to make them as equal as possible. Once the basic components of a plan are in place it can take another day or two to bring the plan to a strict standard of population equality. Courts should keep this in mind if they expect to allow changes to their plan, or to order changes to a plan drawn by a hired

⁴⁹ See *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978).

⁵⁰ *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983).

⁵¹ See *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

⁵² *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)(stating that a court-ordered plan should “ordinarily achieve the goal of population equality with little more than *de minimis* variation” and . . . “must be held to higher standards than a State’s own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.”).

⁵³ *Id.* See also *Johnson v. Miller*, 922 F. Supp. 1556, 1561 (S.D. Ga. 1995) (“Since federal courts are held to stricter standards than legislatures in redistricting, we were particularly constrained to create a remedy with the lowest population deviation practicable.”)(citation omitted); *Burton v. Sheheen*, 793 F. Supp. 1329, 1343 (D.S.C. 1992), *judgment vacated on other grounds by* Statewide Reapportionment Advisory Comm. v. Theodore, 508 U.S. 968 (1993) (“Given that compliance with the principles of one man, one vote is the preeminent concern of court-ordered plans, the very real possibility exists that certain state policies will be compromised in a court-ordered plan which could have been better served had judicial intervention not been necessary.”).

⁵⁴ *Connor v. Finch*, 431 U.S. 407, 414-15 (1977)(“[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people’s name.”).

expert. For plans where the court is intimately involved in the drawing of districts it may be useful for the court first to view a draft plan and then the expert can incorporate their changes while zeroing out the plan.

C. Voting Rights Act

As the Court has interpreted it, the Voting Rights Act places peculiar constraints (if one can call them that) on court-drawn redistricting plans. As far as I am aware, no court plan has ever been held to violate the Voting Rights Act. Perhaps this is because courts generally comply with it, or perhaps because the Act is largely considered inapplicable. In any event, courts go through the motions of reciting the applicable law and explaining why their plan does not run afoul of the prohibition on race-based vote dilution found in section 2⁵⁵ and, for covered jurisdictions, does not run afoul of the prohibition on retrogression found in section 5 of the Voting Rights Act.⁵⁶

1. Section 2

Section 2 of the Voting Rights Act prohibits redistricting plans that dilute minority votes, or cause minorities to have “less opportunity . . . to elect representatives of their choice.”⁵⁷ Specifically, section 2 applies to any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision....”⁵⁸ The relevant questions for our purposes then are: (1) whether the court that draws the plan is a “[s]tate or political subdivision” as contemplated by the Act; or if not, (2) whether section 2 nevertheless covers the plan, because the state will enforce the plan.

While declaring that “[o]n its face, § 2 does not apply to a court-ordered remedial redistricting plan,” the Supreme Court has assumed, without deciding section 2’s reach, that federal courts should comply with section 2.⁵⁹ To some extent, therefore, the question of section 2’s coverage is purely academic, given that the Supreme Court has admonished courts to follow it and no court plan has been held to violate section 2.

⁵⁵ 42 U.S.C. § 1973(a)(2000):

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

⁵⁶ 42 U.S.C. § 1973c (2000)(requiring preclearance by the Attorney General or U.S. District Court for the District of Columbia for any changes in redistricting plans enacted by covered jurisdictions).

⁵⁷ *Id.*; 42 U.S.C. § 1973(b)(describing when a “State or political subdivision” has violated subsection (a)); *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Thornburgh v. Gingles*, 478 U.S. 30, 51 (1986).

⁵⁸ 42 U.S.C. § 1973(a)(2000).

⁵⁹ *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (“On its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict.”); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 628 (D.S.C. 2002); *Smith v. Clark*, 189 F. Supp. 2d 529, 539-40 (S.D.Miss. 2002). Just as with Section 5 of the Voting Rights Act, federal court plans and state court plans may deserve different treatment under section 2. *See McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Section 2 undoubtedly covers a plan drawn by a state court, just as it covers plans drawn by any other state official.

However, one searches the legislative history of the 1982 amendments to the Voting Rights Act in vain to find a specific answer to the question of section 2's coverage of court-drawn plans.⁶⁰ All we do know is that, with the 1982 Amendments, Congress specifically wanted to overturn *Mobile v. Bolden*,⁶¹ which required proof of discriminatory intent in addition to effect for constitutional vote dilution claims.⁶² There is no particular reason to believe that the statute's preoccupation and prevention of the potential discriminatory effects of a redistricting plan should depend on the actor that constructed the plan. Indeed, Congress wanted to prevent dilutive plans regardless of the intent—and arguably the identity—of those who constructed them.⁶³ On the other hand, the caselaw preceding and including *Bolden* dealt with legislatively enacted plans,⁶⁴ and the words of the statute, while ambiguous as to their coverage, certainly do not go out of their way to *include* court-drawn plans.⁶⁵

Although the standard for vote dilution is the same for legislative and court-drawn plans, the unique redistricting principles that guide a court could affect how its plan complies with section 2—that is, exactly how it designs districts where minorities have an equal “opportunity to elect their candidates of choice.”⁶⁶ In particular, a court's refusal to look at partisanship and incumbency might lead it to design districts with higher minority concentrations than it would if it knew the political complexion of the district or the identity (and race) of the incumbent. For example, it might be the case that for districts without an incumbent (open seats) a district's voting age population (VAP) need only be fifty percent black for African Americans to have an equal opportunity to elect their candidates of choice. However, if there is a white incumbent, the district would need to be sixty percent black, and if there is a black incumbent, it need only be forty percent black.⁶⁷

Moreover, the percentage needed to comply with section 2 will also depend on the partisanship of white voters in the designed district and their willingness to vote for the candidate favored by the African American community.⁶⁸ For example, a forty percent black district might be an effective minority district (for purposes of section 2) if half the whites in the district are Democrat, but will likely not be effective if all the whites in the district are Republican. The decision not to consider partisan factors will lead a court to

⁶⁰ See S. REP. No. 97-417, P.L. 97-205, VOTING RIGHTS ACT AMENDMENTS OF 1982, MAY 25, 23, 1982.

⁶¹ *Mobile v. Bolden*, 446 U.S. 55, 63 (1980)(requiring both discriminatory intent and effect to prove unconstitutional racial vote dilution).

⁶² *Id.* at 62.

⁶³ See *infra* note 60.

⁶⁴ See, e.g., *White v. Regester*, 412 U.S. 755, 756 (1972); *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971).

⁶⁵ See 42 U.S.C. § 1973(a) (2000).

⁶⁶ *Id.*

⁶⁷ See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407 (2001) (describing the importance of incumbency and partisanship for a district's ability to give minorities and equal opportunity to elect their candidates of choice).

⁶⁸ See *id.*; Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002) (discussing *Page v. Bartels*, 144 F. Supp. 2d 346, (D.N.J. 2001) (three-judge court) (per curiam), a case in which reduced minority concentrations in districts were found to comply with section 2 of the Voting Rights Act).

err on the side of caution, drawing districts with minority concentrations that exceed what might be necessary if it knew the political predispositions of white voters and the identity of the incumbent, if any, that would run from such a district.

2. Section 5

Section 5 of the Voting Rights Act requires certain covered jurisdictions to submit their redistricting plans to the Attorney General or the U.S. District Court for the District of Columbia for preclearance to ensure such plans do not have the purpose or effect of retrogressing with respect to minority voting power.⁶⁹ The following questions arise concerning court-drawn plans and section 5: Which, if any, court-drawn plans must be precleared? For even those plans that do not need to be precleared, should they abide by the non-retrogression requirement anyway? And if so, what is the appropriate benchmark against which a court should measure retrogression?

To begin with, the Supreme Court has made abundantly clear that section 5 does not require federal courts to preclear plans they have prepared and adopted.⁷⁰ However, that principle implies several qualifications. The first is that this rule applies only to federal courts.⁷¹ State court plans must be precleared just as any “standard, practice or procedure with respect to voting” that a covered state or jurisdiction seeks to “enact or administer” must be precleared.⁷² Moreover, plans proposed by the state and adopted by a federal court must be precleared.⁷³ “[W]henver a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable.”⁷⁴

The tricky cases, then, are the intermediate ones that occupy a gray area between court-adopted and court-drawn plans. Often courts will pick and choose from various plans offered by the parties to the litigation or other interested groups, including various officials representing the “state.” The degree of innovation required by a court before a plan can be said to be court-drawn will depend greatly on the facts of the individual case. Moreover, courts will often modify their plans to accommodate objections or suggestions made by political parties and various politicians.

These rules concerning preclearance place a court in a difficult position and raise a number of questions if the court wishes to involve outside participants in the construction of the court’s plan: Which accommodations are significant enough to require preclearance? Should the need for preclearance of a partially adopted plan depend on the position of power held by the proponent of such changes? The difficulties created by the preclearance requirement for court-adopted plans provide a disincentive for the court to hold hearings or accept proposals upon which it could model its plan. Of course, if the

⁶⁹ See 42 U.S.C. § 1973c (2000); *Georgia v. Ashcroft*, 539 U.S. 461, 477-78 (2003) (most recent case interpreting section 5 and defining retrogression).

⁷⁰ *Connor v. Johnson*, 402 U.S. 690, 691 (1971).

⁷¹ *Branch v. Smith*, 538 U.S. 254, 262 (2003) (“The Act requires preclearance of all voting changes, and there is no dispute that this includes voting changes mandated by order of a state court.”)(citation omitted).

⁷² See *id.*; *Abrams v. Johnson*, 521 U.S. 74, 95 (1997).

⁷³ *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)(holding that the preclearance requirement of the Voting Rights Act applies to a reapportionment plan submitted to federal courts by the county legislative body).

⁷⁴ *Id.*

Act did not require preclearance of such plans then jurisdictions might be able to end-run the preclearance requirement. They could refuse to pass a plan, and instead, they would later propose it to the local district court charged with constructing a plan that must defer to legislative policies (as reflected in the proposed plan).

Even for plans a federal court creates on its own, however, the Court has specified that they ought to avoid retrogression—that is, they should avoid making minority voters worse off. Echoing the Senate Committee report accompanying the 1975 reauthorization of the Voting Rights Act, the Court in *McDaniel v. Sanchez* explained, “in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.”⁷⁵ The Court later described this as “a reasonable standard, at the very least as an equitable factor to take into account, if not as a statutory mandate.”⁷⁶ Therefore, even though they do not need to preclear their plans, courts should make sure that their plans for covered jurisdictions do not make minorities worse off.

The question then remains: worse off as compared to what? What should be the benchmark against which a court should measure retrogression for purposes of its plan? The answer according to *Abrams v. Johnson* is that retrogression should be measured against the last legally enforceable plan, meaning the last plan that was in effect and complied with the Constitution and Voting Rights Act.⁷⁷ This will often mean the plan immediately preceding the one that the court has just enjoined and now seeks to remedy, except that in some cases the preceding plan was also unconstitutional or illegal.⁷⁸ Moreover, this rule produces the somewhat ironic twist that in cases where a court strikes down a new plan on one-person, one-vote grounds, it may end up using as a benchmark for Section Five purposes the plan passed ten years earlier, which is now even more malapportioned due to population shifts than the one the court just struck down.

From the standpoint of administrability, if not fealty to the original intent of section 5,⁷⁹ the Court’s most recent decision lowering the bar for what constitutes retrogression should allay any fears a court might have about its plan’s compliance. *Georgia v. Ashcroft*⁸⁰ significantly defangs section 5, which many previously (and apparently erroneously) had interpreted as focused on maintaining majority-minority districts.⁸¹ Under *Ashcroft*, a plan enacted by the legislature need not match the proportion of such districts in the benchmark plan and can instead opt for fewer majority-

⁷⁵ *McDaniel*, 452 U.S. at 149 (quoting S.Rep. No. 94-295, p. 19 (1975), U.S. Code Cong. & Admin. News 1975, pp. 774, 785)(internal quotations omitted).

⁷⁶ *Abrams v. Johnson*, 521 U.S. 74, 96 (1997).

⁷⁷ *Id.*

⁷⁸ For criticism of the Court’s approach in *Abrams* see Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 748-49 (1998).

⁷⁹ Compare Pamela Karlan, *Georgia v. Ashcroft and The Retrogression of Retrogression*, 3 ELECTION L. J. 21 (2004) (criticizing the Court’s most recent decision interpreting retrogression), with Michael J. Pitts, *Georgia V. Ashcroft: It’s the End of Section 5 as We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265 (2005) (defending the decision).

⁸⁰ *Georgia v. Ashcroft*, 539 U.S. 461, 477-83 (2003)(providing guidelines for determining when a reapportionment plan diminishes a “minority group’s effective exercise of the electoral franchise” in violation of section 5).

⁸¹ See *Beer v. U.S.*, 425 U.S. 130, 141-42(1976)(establishing the standard for retrogression later modified by *Georgia v. Ashcroft*).

minority districts and a greater number of “influence districts.”⁸² Without delving too deeply into that decision,⁸³ suffice it to say that covered jurisdictions do not need to worry as much about section 5 as they did previously.

Following *Ashcroft*, questions such as the appropriate benchmark are likely to recede in importance as jurisdictions justify their plans as maintaining an appropriate mix of districts where minorities can influence or control who gets elected. Whereas before *Ashcroft* jurisdictions would assiduously attempt to maintain the same number of majority-minority districts with nearly the same racial percentages, now they can more easily opt for lower concentrations of minorities among a greater number of districts.

Perhaps this new, flexible rule of retrogression applies to court-drawn plans and perhaps not. On the one hand, a court plan that reduces the number of majority-minority districts in favor of a greater number of influence districts does not make minorities worse off, and does not retrogress according to the *Ashcroft* standard. However, the decision to opt in favor of influence districts when the state has a policy of creating majority-minority districts may go against the general rule of deference that governs court-drawn plans. The same could be said of a court-plan’s move to majority-minority districts from a legislature’s plan that created influence districts. Although as a technical matter, either strategy appears fully compliant with Section 5, the decision over which strategy to follow could be another one of those legislative decisions to which the courts should defer.

II. Process⁸⁴

A quick review of any random sample of court-drawn redistricting plans would illustrate the remarkable variety of processes that courts employ when they are confronted with the “unwelcome obligation” of drawing a district map. Courts vary considerably in how and when they draw their maps, whom they get to help them, who will have input into the process and when, and whether they will make changes to a plan once it is released. In part, this variety (or inconsistency) derives from the unique context that drives each redistricting process, and in part, it comes from the lack of any data that can guide courts once confronted with the task. The choice of different procedures, however, can have a dramatic impact on the final plan that emerges. In this Part I describe the various approaches and assess the costs and benefits of each.

By way of introduction, I should simply stress the unique environment that confronts a court as it begins to construct a redistricting plan. It should go without saying that court-drawn plans can present one of the most intense inter-branch conflicts that our constitutional system allows. After all, decisions that a court makes in constructing its plan will often lead to legislators losing their jobs and in some cases might significantly alter who controls legislative chambers. The courts usually get involved only after negotiations between the political parties break down, having produced a poisonous environment of partisan acrimony. Correlatively, the affected parties will analyze each

⁸² *Ashcroft*, 539 U.S. at 482.

⁸³ For a more extensive analysis of *Ashcroft* from a fan of the decision see Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004). See also Pitts, *supra* note 86.

⁸⁴ Most of the foregoing derives from my personal experiences in assisting courts and special masters in drawing redistricting plans.

decision a court makes for any hint of bias, be it partisan, personal or institutional. Moreover, since the construction of such plans is a group effort, as we shall see in a moment, there always exists a temptation for each participant to disclaim responsibility and point the finger of blame toward other participants, once the losers in the process take aim and try to discredit the court, the plan, or its drafters.

No redistricting plan—and certainly no court plan drawn under exigent circumstances—is perfect. Indeed, if a plan was possible that could please everyone, then the court would likely not be involved. The most a court can hope for is a plan that is immune to legal challenge and can be justified by coherent principles, as well as a process that is widely regarded as fair, nonpartisan, and transparent.

A. When and Why Should Courts Redistrict?

The nature of the litigation that forces court involvement will often determine the timing and pace of development of a court-drawn plan. If I had just one recommendation to make (from the standpoint of one who draws maps), I would urge courts to avoid waiting until the last minute to begin drawing maps and not to rush the line-drawing process. The series of frenzied 24-hour days that often precede a court-drawn plan is suboptimal, to say the least, for construction of plans that will determine representation for a state for years to come. On the other hand, from the standpoint of the jurisdiction, the court should only act with its own map once the political branches have failed to pass their own plan. Giving the legislature every opportunity to complete its plan flows from the general rule of deference described above. It also makes sense from the standpoint of saving the jurisdiction money, because the cost of construction of a court-drawn plan (along with all the supporting materials and participants described below) can often reach well beyond half a million dollars for a statewide plan.

One way to reconcile the conflicting pressures of time and deference is for a court to begin drawing its map *at the earliest point* when it becomes clear that the state will not be able to craft a legal plan in time for elections. That impasse may be reached soon after the court issues its decision striking down the extant plan, or it may be reached only after the parties have pulled their hair out for months and failed to reach a compromise. Moreover, courts should recognize that by beginning to draw their own map they do not necessarily prevent the legislature from making headway on its own plan contemporaneously.

Courts must be aware of several salient dates when deciding on the timetable for their plan: the dates for the beginning and end of the qualification period for candidates and parties for the primary election ballot, the date when military, overseas, and other absentee ballots must be mailed for the primary election, and the other dates specified for printing ballots and running the elections. Sometimes in the course of a redistricting struggle and creation of a plan, courts will adjust these dates in order to ensure that candidates are not prejudiced by the failure of the state to develop its own plan. However, in order to give the state enough time so that the process for ballot qualification, ballot printing and mailing, precinct redefinition, and election administration can go forward, a court should have as its goal the imposition of a plan no later than one month before candidates may begin qualifying for the primary ballot. This means that the court should begin drawing its plan about three months before the

beginning of ballot qualification in order to build in time for possible hearings and adjustments to the plan.⁸⁵

I think it is fair to say that given the current state of technology, experts can draw a redistricting plan for any statewide plan (either legislative or congressional) in about a week. However, a quick plan is not necessarily a good plan. Indeed, a computer can draw a statewide equipopulous plan by itself in a matter of hours or even minutes, but it is unlikely to be one a court (or anyone) would want to adopt. Furthermore, the time required to produce a plan is a function of the number and character of the constraints placed upon it. For example, drawing plans for areas where section 2 or 5 of the Voting Rights Act might present serious constraints will take longer (all other things being equal) than will drawing a plan for an all-white area. And drawing a plan that takes into account partisanship, incumbency, or communities of interest will take longer than one that ignores such factors. Allowing one month for the drawing of a plan and an additional month for hearings and potential modifications to it should build in enough of a cushion so that all concerned can proceed in a non-frenzied fashion.

B. Three Models of Judicial Mapmaking

Given how many times courts have drawn their own redistricting plans in the last forty years, the lack of uniformity as to process is somewhat surprising. Here I describe three procedural models for court-drawn plans, although an infinite number of permutations or alternatives are also possible. The modal arrangement involves the appointment of a Special Master who then submits a plan to the court for its approval or modification. The second involves more active participation by the court, which hires its own expert to help the judges draw the plan themselves. And finally, some courts will merely ask interested parties to submit alternative plans and the court will choose to adopt or modify one of them.

1. The Special Master Model

Courts will often appoint Special Masters, pursuant to rule 53 of the Federal Rules of Civil Procedure, to supervise the production of a court-drawn plan.⁸⁶ Courts use Special Masters for this task in order to place some distance between themselves and the plan. Because the drawing of district lines can be such a sensitive political task, the appointment of a Special Master, particularly a retired judge or in some cases a redistricting expert, allows the court to disclaim responsibility for the specifics of a plan. Instead, the court's role under this arrangement could be to set the principles, if any, that the Special Master will follow in construction of a plan, as well as to approve, reject, or entertain objections to the plan. This model is resource-intensive since it often requires the employment of a legal team to help the Special Master develop a report to accompany the plan, as well as the employment of one or more experts to assist in production of the

⁸⁵ Rarely does a court meet the timetable I am specifying here, but releasing the final version of a plan one month prior to the beginning of the petitioning period is a reasonable goal that would also give potential candidates sufficient notice as to the location of their districts and a reasonable time to decide whether they wish to run.

⁸⁶ See Fed. R. Civ. P. 53 (providing guidelines for the appointment and activities of masters).

plan and the accompanying affidavits. Under such a system, the Special Master often becomes an advocate and defender of his or her plan, and responds to objections the parties and the judges raise.

The degree of isolation of the Special Master and his or her distance from the court depends on the particular context of the litigation. In some cases, the Special Master is in frequent contact with the court, even showing them drafts of the plans, and in others the court only receives the plan when the parties to the litigation do.

2. The Court Controlled Model

Sometimes courts will eliminate the middleman and simply hire an expert to help them draw their own plan or even draw it themselves. This model can be effective (and inexpensive) for judges who have a good idea as to what they think the plan should look like or who are less afraid of the potential fallout. Also, for plans that are remedying limited, specific, and identifiable defects in the extant plan, this approach seems most appropriate. Such a case might include, for example, a redrawing of just a few districts that may have been found to violate the Voting Rights Act or *Shaw v. Reno*.⁸⁷ Even for more detailed and extensive plans, though, this approach will sometimes be best where the court faces extreme time constraints, such that the special master model might be too cumbersome.

The cost of such an approach, however, is that the court cannot then disclaim responsibility for its map. As an active participant in the drafting of the plan, the court should be prepared for the partisan accusations that will often fly upon the plan's release.

3. The Adopted Plan Model

A court might decide to place the burden of proposing a remedy on the parties to the litigation or, for that matter, any interested party willing to suggest a redistricting plan. Under this procedure, the court sits back and evaluates alternatives and selects from a buffet of options presented to it. This process may or may not require the assistance of an expert to help evaluate the submitted plans, depending on whether the court feels confident that it can adequately assess the compatibility of the proposals with certain legal and other requirements.

As with the other models, there are costs and benefits to this approach. On the one hand, by outsourcing the drafting process to others, the court has the luxury of choosing from several plans and can do so with less cost than if it hired a team to draw the plan. However, the risk always exists that the court might find all proposals deficient, either because they violate the law or because they arise from narrow and often partisan interests. If, for example, the court is placed in the position of deciding between a plan proposed by the Democrats and another by the Republicans, either choice is fraught with political dangers. Thus, this process might be best used when the likely proposals do not appear politically risky for the court, as might be true for a local elected body.

Of course, this approach can be merged with either of the two previous approaches to produce a hybrid in which the court or the Special Master begin by

⁸⁷ *Shaw v. Reno*, 509 U.S. 630, 658 (1993)(holding that a reapportionment plan was unjustified in the manner in which it served to segregate voters, in violation of section 5).

accepting proposals offered by parties and other interested groups. If one proposal is clearly preferable, then it could be adopted, saving the court time. If not, then the court or Special Master might work off one or more of the plans to produce a hybrid believed to be superior.

However, an additional drawback to the adopted plan approach and perhaps to its variants is that the plan might be subject to Section 5 preclearance if it is a plan for a covered jurisdiction. As noted above, the rule from *McDaniel v. Sanchez* requiring preclearance of plans “reflecting the policy choices of the elected representatives of the people” applies to plans adopted, though not drawn, by a federal court.⁸⁸ Indeed, for a federal court deciding which approach to take in imposing a plan for a covered jurisdiction, the court (and perhaps even the jurisdiction) has the somewhat perverse incentive to avoid entertaining suggestions from the political branches. The more influence that the jurisdiction’s elected officials or their proxies have over the court’s plan, the closer the court comes to adopting a plan that could be held up for 60 days by the Department of Justice.

C. The Personnel Involved in Drafting a Court Plan and the Division of Responsibilities Between Them

Depending on which of the above approaches a court pursues, different people will be involved in the line-drawing process. By the end of a redistricting process supervised by a federal court, it is not unusual to have witnessed involvement by some combination of the following people: each member of a three judge panel, one retired judge or other Special Master, a legal support team of two or more lawyers, somewhere between one and three redistricting experts who actually draw the districts, an expert on local political geography, perhaps an expert to perform racial bloc voting analysis, a handful of technicians and computer specialists, someone in charge of security for both the data and rooms where the line-drawing takes place, and a staff of people producing and handling the enormous amount of documentation that often accompanies a plan. The challenge in selecting people to work on the plan is to find experts in their respective fields, who are insulated from political pressure, and who have a credible claim to impartiality and nonpartisanship. This is easier said than done.

In order to rein in spiraling costs of developing a plan, courts will usually request and receive extensive support from a jurisdiction’s redistricting office. Relying on state officials can often place them in a delicate position, though, especially if they owe their jobs to incumbents whom the court’s plan could potentially threaten. Moreover, many of these officials may have helped craft the plan that the court recently struck down and may feel some sense of obligation to the bargain that gave birth to that plan. In some cases, they will be working on plans for their legislative bosses as the court works on its own plan, so they will be forced into the impossible position of being a partisan tool on one day and a neutral line-drawer the next.

The delicacy of “seizing” a redistricting office illustrates a fundamental personnel problem that affects any court developing its plan. Ideally, courts should hire people who are skilled in the art of redistricting, knowledgeable about the state, and politically unbiased. It is remarkable how rarely these three qualities exist together in potential

⁸⁸ See *supra* notes 75-76 and accompanying text.

assistants to the court. Redistricting experts that are also knowledgeable about the state have usually been tapped by one party or another and have an obvious conflict, or their appointment will lead to apoplectic objections from participants in the litigation. As a result, courts will often turn to experts from outside the state and try to use hearings or other means to give the line-drawers the information they need to construct the map. Of course, outsiders will be accused of a lack of sensitivity to local politics and communities of interest, which to some extent is what makes them more qualified in the court's eyes.

D. Gag Orders, Confidentiality and Security

At the risk of beating a dead horse, let me reemphasize the sensitive nature of the task performed by those who assist the court in constructing a plan. As the court begins the line-drawing process, everyone is eager to know who is "winning" under the court plan. Moreover, inside knowledge might lead to a change in the bargaining position of the parties who may be attempting to iron out a deal before the court releases its plan. As a result, it is imperative that the computers and rooms are secure and off-limits to any legislators or interested parties who often just happen to be roaming nearby. Further, it is often in the interest of those working on the plan, let alone the court, to have a gag order in effect that prevents them from discussing their work on the plan with any outsiders. State employees, in particular, who are likely to be pressured by the state legislators with whom they work on a daily basis, may want to have some document that they can wave in front of the many people who want to pump them for information.

E. Where to Begin?

1. When, If Ever, Should Hearings Be Held?

Depending on the time constraints placed on a plan and the model the court chooses to follow, a court or a special master may wish to hold hearings before it begins the process of drawing its own map. The court could limit participation in the hearing to the parties to the underlying litigation or it could open it to the public. The substantive scope of the hearing could run the gamut from proposed principles to guide the court or Special Master in construction of the plan, to proposals of actual plans, partial plans, or proposed districts. Such hearings can aid the court in providing building blocks for its plan as well as justifications for the districts it later draws. Moreover, given the now widespread availability of computer mapping software, such hearings can constitute remarkable examples of participatory democracy with all kinds of groups attempting to identify their community of interest and to have their say over the court plan. Of course, when time is of the essence such hearings can constitute a major distraction from the actual work of drawing a plan. One alternative, in order to save time, is to allow written submissions from all interested parties and to place them on a publicly available website. Also, in the event the court does not have hearings at the front end, it can always hold them after it releases its plan.

2. Choosing an Initial Plan as a Template

One of the more important decisions to be made at the front end of a redistricting process concerns what plan, if any, the line-drawers should work from in constructing the court's plan. This will, of course, depend on the context of court involvement and whether its role is to make minor modifications to the plan it just struck down or to draw a more comprehensive plan. Among the possible starting points are: (1) the existing plan; (2) a preexisting plan from a prior redistricting; (3) plans submitted by the parties or outsiders; or, (4) working from scratch. To some extent this decision will be driven by an assessment as to which plan best articulates the state's redistricting traditions and principles. Of course, the default option, based on the considerations mentioned in the discussion of deference above, is to work off the existing plan, but often the constitutional or other legal infirmities in that plan will disqualify any plan that merely tinkers at its edges. Additionally, in some cases, doing so is literally impossible, such as when a state loses or gains a significant number of congressional districts.

Often it makes sense for the court to pick out sections of proposed plans and merge them together. For example, a court might decide to accept a Republican-authored plan for Republican areas of a state, a Democratic plan for Democratic areas of the state, and for the court to draw its own lines for competitive regions. Needless to say, the decision to work off of only one political party's plan invites criticism on grounds of bias. Also, a court should beware of non-partisan explanations offered for plans proposed by partisan actors. Rarely will a political actor propose a district by saying "this helps out me and my friends but hurts my opponents, and therefore the court should adopt this plan." More likely, partisans will justify their plans by appeals to arguments about the proposal's respect for traditional redistricting principles, and in particular, representation of communities of interest.

3. Which Data to Use?

Any data that can be tied to a geographic point or area can be incorporated into a redistricting program. That is, any information that can describe a piece of land or its occupants can be part of the information that line-drawers see and consider as they draw a redistricting plan. Certain types of data are more difficult to come by (e.g. credit card data or magazine subscription lists) than others (e.g., publicly available census data), and states vary significantly in which data they make publicly available. Before beginning construction on its map, the court should decide what data they would like loaded into the redistricting program (as well as which redistricting program the mapmaker should use⁸⁹). Furthermore, opposing parties to the underlying litigation will often want to verify the accuracy of the data that the court will be using to construct its plan.

a. Census Data—The P.L. 94-171 File

⁸⁹ See Lisa Handley, *A Guide to 2000 Redistricting Tools and Technology*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY* 30-31 (Nathaniel Persily ed., 2000).

The data that the Census Bureau makes available in time for decennial redistricting is presented in the P.L. 94-171 redistricting dataset.⁹⁰ This dataset is specifically designed to allow jurisdictions to comply with one-person, one-vote and the Voting Rights Act. Therefore, it only provides the following data: aggregate population and voting age population totals broken down by race and Hispanic origin.⁹¹ It provides these data for every level of census geography: census blocks, block groups, tracts, etc.⁹² Courts should also make a decision as to the level of geography at which the plan should be drawn. The smaller the level of geography the more easily one can comply with one-person, one-vote, as well as other constraints. However, redistricting at the block level (which is what most line-drawers do) will often increase the odds that districts will be less compact and that precincts will be split (unless such features are assiduously respected).

In the event the court redraws lines at some point after the first two years of a census cycle, other census data might also be available. Those data would come either from short form data (such as citizenship status) released later, census projections, or data gathered from the long form of the census or another census survey. The long form of the 2000 census asked questions of one of six respondents concerning, for instance, the condition of their dwelling, certain socioeconomic characteristics, and family information, most of which is irrelevant to the redistricting process.⁹³ Furthermore, certain projections of census data might also be available, although their reliability will obviously be shaky as one gets farther down the level of geography and farther away from the original census, and might not be available at the block level.

Indeed, this raises another issue for a court to consider if it is redistricting in the middle of the decade, which it often does if it is responding to a lawsuit. Relying on beginning-of-the-decade census data for a mid-decade redistricting naturally ensures that the plan will not take into account population changes that have taken place since the last

⁹⁰ See P.L. 94-171, 89 Stat. 1023 (December 23, 1975) (“An Act . . . to provide for the transmittal to each of the several States of the tabulation of population of that State obtained in each decennial census and desired for the apportionment or districting of the legislative body or bodies of that State. . .”).

⁹¹ Note that the census redistricting datafile includes all types of people who are ineligible to vote, such as children, prisoners, and non-citizens.

⁹² See generally Nathaniel Persily, *Color by Numbers: Race, Redistricting and the 2000 Census*, 85 MINN. L. REV. 899 (2000) (describing publicly available census data and its drawbacks for redistricting). The 2000 Census allowed respondents to check off more than one racial category. Thus, the redistricting dataset presented racial and ethnic data in 126 independent categories. Each combination of the six single-race categories amounted to 63 different categories, times two for the Hispanic/non-Hispanic origin question. In some cases courts may need to decide on how they will aggregate multiracial data; for example, whether those who check off black *and* something else will be counted as black *or* something else. I have discussed the issues presented by the multiracial checkoff elsewhere. See *id.*; Nathaniel Persily, *The Legal Implications of a Multiracial Census*, in Joel Perlmann & Mary Waters, *THE NEW RACE QUESTION* 161 (Russell Sage Press, 2002). The Supreme Court has given some guidance on this issue. In *Georgia v. Ashcroft*, it explained that in cases where the dilution of black votes is at issue, anyone who checked off black, even if they checked off some other category also, should be counted as black. *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003).

⁹³ See Nathaniel Persily, *Color by Numbers: Race, Redistricting and the 2000 Census*, 85 MINN. L. REV. 899 (2000). The new “American Community Survey” asked yearly of 250,000 respondents will replace the long form of the 2010 Census and subsequent censuses. See U.S. Census Bureau, American Community Survey, available at <http://www.census.gov/acs/www/> (last visited May 20, 2005) (explaining the new survey).

census. However, relying on census projections—even assuming they are available for the necessary level of geography—opens the plan up to the charge that the underlying data are mere unreliable speculations, as opposed to an actual enumeration of the area’s population. For the most part, courts drawing congressional plans will play it safe and use the outdated census numbers, which remain the “best census data available”⁹⁴ in order to comply with the strict requirement of population equality. For non-congressional plans, a court could also use the old data while paying attention to the census projections so as to justify deviations from perfect population equality in faster growing parts of the state.

b. Political Data

As described in the next Part, the decision whether to pay attention to the partisan- or incumbency-related effects of a plan may be the most important decision a court makes. If the court does wish to know the political effects of its plan, many different types of data might be available.

For the states that collect it, the easiest data to acquire are party registration data, which indicate how many Democrats, Republicans, Independents, etc., live in a particular area. Those data provide a rough cut of the political character of an area, but they are not terribly reliable in predicting the partisan advantage or competitiveness of a district. Because in some areas, and for some population subsets (e.g., rural Southern whites), party identification and voter preferences often may not be coterminous, registration statistics will not give an accurate picture of the likely outcome of an election in that district. Moreover, in areas with a large number of independents, the registration data will give no answer as to the likely partisan predisposition of the district.

Therefore, to assess the true political complexion of an area one needs to examine previous election data. But which elections will be most revealing? The difficulty here is that most elections are not competitive, so their results will misrepresent the expected vote a candidate of a given party will achieve in a future election. Using presidential election returns from Texas in the last election, for example, would not produce reliable predictions for redistricting of the Texas legislature since the data are warped by the fact that an incumbent president, who was also a former governor of the state, was the Republican candidate and his opponent did not waste time competing for votes in that state. The same can be said for most congressional elections, in which the incumbent usually trounces a low-quality challenger.

In attempting to construct the “normal vote” for an area, ideally several elections will need to be aggregated together to get an idea of how the average Democrat or Republican candidate will perform in the district, holding all other qualities of the candidate or unique characteristics of the election equal.⁹⁵ The political parties develop for themselves (and keep tightly guarded) intricate models of political performance that they use when drawing their plans. Sometimes time prevents courts from developing similar statistics, but looking at the last few competitive statewide elections or down

⁹⁴ *Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

⁹⁵ See Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AMER. J. POL. SCI. 514 (1994); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AMER. POL. SCI. REV. 541, 559 (1994).

ballot races⁹⁶ as proxies for political performance can provide a rough idea of the advantage, if any, that a party will have in a particular district.

Finally, almost all states provide in their redistricting datasets the location of incumbents' residences. In fact, sometimes a redistricting program will designate their residences by a small elephant if the incumbent is a Republican, or a little donkey where the Democratic incumbent resides. If the court wishes to pay attention to incumbent residence—in order to avoid incumbent pairings, for example—such data can easily be loaded into the program if they are not there already. Of course, anyone's address (including that of potential challengers or other potential candidates) could be loaded into the program as well, and datasets controlled by parties will include them.

c. Community of Interest and Topographical Data

In addition to the obviously relevant data described to this point, jurisdictions might also include all kinds of data designating community characteristics. Locations of schools, universities, prisons, churches, army bases, country clubs, airports, factories, farms and the like can be called up on the computer screens, as well as socioeconomic, cultural or other community-describing data that might be incorporated into the program.

The same can be said for data that describe the land, as opposed to the people. One can identify where forests, wetlands, mountain ranges, bodies of water, islands, parks, etc., are located, as well as transportation lines, such as roads, railroads, subways, bridges, and highways. Such topographical and transportation features might be useful guideposts for drawing district boundaries, as they often form natural (or artificial) barriers between regions that allow for the creation of “neat” districts with easily identifiable edges.

d. Political Boundary Data

In addition to census categories of geography, which normally form the building blocks of districts, a variety of politically significant boundary lines receive great attention in the process of building a redistricting plan. Indeed, for some states these boundaries have important legal statuses because the law prohibits unnecessary or excessive splits of political subdivisions. Political subdivisions come in many forms: counties, parishes, cities, towns, school districts, judicial districts, water districts, etc. In general, county lines are relatively fixed, but for some political subdivisions, the lines are hardly static: city lines will often change frequently due to patterns of annexations and secessions. This is all the more true for precincts, some of which may change yearly to accommodate rapid population growth. Ideally, to minimize disruptions to electoral administration, a court should strive to use precincts as the building blocks of a plan. However, both time and concerns about compliance with one-person, one-vote and other legal requirements lead to redistricting at the census block level.

Also, it is often helpful to look at other districting arrangements when constructing a plan for another representative body. For example, if one is charged with the responsibility of drawing a plan for a state's lower house, it may be helpful to look at

⁹⁶ Down ballot races are elections for offices concerning which the average voter knows very little about the candidates (e.g., state comptroller) and is more likely to vote based on partisan affiliation.

the lines drawn for the state's senate. Or if one is drawing a congressional map it may be useful to examine the boundaries of the legislative elections. The state's redistricting computer will typically include all kinds of existing and past districting arrangements for every representative body from town council to school board to Congress.

F. Incorporating Objections to the Plan

Even if the court does not hold a hearing before work on the plan begins, it will often hold a hearing after releasing the plan, in order to receive objections and comments. Before entertaining objections, it is important for the court to decide what kind of objections, if any, it is willing to accommodate. Obviously, the court will consider all legal arguments and, if valid, accommodate them. But what about objections clothed as arguments to make the plan "better"? Will arguments as to partisan bias in the plan or unfair pairing of incumbents be the kind of objections that will lead to changes in the plan? Will the court accommodate objections as to respecting political subdivision lines or communities of interest? What about deals that incumbents in adjoining districts have worked out among themselves? What about arguments as to the difficulties of administering elections under this new set of lines? With each accommodation of objections or suggested changes the court will be forced to justify: why this change and not others? Moreover, with each change will come a new round of objections, because expectations that were settled before the change become unsettled once a new line is drawn. Stakeholders who remained silent under the previous plan will now have objections they consider equally valid to those that the court accommodated and that placed them in their worsened position. In other words, once the court starts making changes, it will be difficult to stop. The omnipresent fear of unraveling should provide a healthy counterbalance to the natural inclination to please as many people as possible.

G. Giving the Legislature a Third Bite at the Apple

Once the court releases and adopts its plan, should it nevertheless still allow the legislature one last shot to pass its own plan? Obviously, if the state fails to pass a plan before the court finishes its own, it is unlikely to do so soon afterward. But in some cases, the political parties may have been holding out for the court's plan to see how they might fare.

When the court releases the plan and establishes a new default, however, the obstacles to compromise may melt away. For example, if both parties see the court's plan as threatening their incumbents equally, perhaps they will both now agree to a statewide incumbent-protecting gerrymander. Compromise prior to the release of the court's plan is often difficult if either party believes the court will draw a more favorable plan than the one its opponent is offering. Once the results of that gamble are known and the parties bargaining positions change, new possibilities may arise.

The court should decide at the front end of a redistricting process if it plans to give the legislature a third bite at the apple once the plan is released. The court probably does not want to inform the parties of its intentions; otherwise they might be even less likely to iron out a compromise in the intervening period. However, by deciding at the front end whether the legislature will be given another chance, the court can organize the

calendar for development of its plan accordingly. For redistricting plans for jurisdictions covered by section 5 of the Voting Rights Act, a court considering whether to give the legislature another chance must also acknowledge the possibility that its plan might go into effect if the legislature's plan cannot receive preclearance quickly.

The law is far from clear as to whether a court must or should allow a legislative plan to supplant its own plan, if it can be done in time for upcoming elections. On the one hand, the principles of legislative deference described above would suggest allowing this third bite at the apple.⁹⁷ On the other hand, once the state has abdicated its role as redistricter, its argument that the court should invest an incredible amount of time, effort and resources into constructing a plan, but nevertheless allow the state another chance, rings pretty hollow.

III. Substance

The applicable law, by itself, is insufficient to direct the production of a districting plan. The ultimate form of a plan depends on important decisions that the relevant actors will make concerning nothing less than the undergirding philosophy of the plan. To be sure, the state's traditional districting principles will provide additional guidance, but such principles are open to multiple interpretations, and a mapmaker can draw a near infinite number of plans that comply with such principles, as well as the applicable law. In the event that the court is not merely touching up a plan it just struck down, it will usually ask its experts to draw compact, contiguous districts based on political subdivision lines. Beyond those principles, courts will vary considerably in the degree of attention they will pay to maintaining the cores of districts or protecting incumbents.

A. Traditional Districting Principles

Given the Supreme Court's fascination with "traditional redistricting principles" in its racial gerrymandering cases, it is unsurprising that courts charged with drawing their own maps latch onto those principles for guidance.⁹⁸ The "big three" on such a list would include compactness, contiguity, and respect for political subdivision lines,⁹⁹ although which principles are "traditional" will always depend on the particular state. Just behind those three come respecting communities of interest, respecting the cores and/or configurations of prior districts, and protecting incumbents.¹⁰⁰ Of course, many of these principles might run headstrong into legal requirements such as the Voting Rights Act or one-person, one-vote, which will often force the creation of non-compact districts that break up political subdivisions or significantly change previous districts.

It is important to note at the outset that there is no such thing as "neutral" districting principles, no matter how strong the historical pedigree or embodiment in tradition some principles can claim. Anyone with sophisticated knowledge of the

⁹⁷ See *supra* Part I(a)(i)(1).

⁹⁸ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *Bush v. Vera*, 517 U.S. 952, 958-65 (1996).

⁹⁹ See, e.g., *Shaw*, 509 U.S. at 647.

¹⁰⁰ See, e.g., *Bush*, 517 U.S. at 964, 977.

political geography of the state can tell you who wins under the application of one or another “neutral” districting principle. The effect of ordering the creation of compact districts that adhere to political subdivision lines, for example, will bias a plan in favor of the political party that is more evenly and efficiently dispersed throughout the state.¹⁰¹ This is not to say that such principles come anywhere near approaching the bias produced by a political gerrymander. However, once the court announces the principles that will guide its plan and prioritizes them, all interested parties will have a good idea as to who will likely be advantaged.

1. Compactness

The first inclination for almost any person in charge of redrawing a map is to say “let’s clean it up.” Indeed, non-compact or bizarre-looking districts usually indicate that “something is up”—meaning that some intentional decision has been made to group people into a strangely shaped district. Aesthetic characteristics by themselves, though, provide a poor philosophical justification for drawing district lines, except insofar as certain mathematical measures of compactness can fairly be said to be politically neutral. Compact districts may have the advantage of providing coherence to a districting arrangement, and in theory, they give voters and candidates clearer signals as to the boundaries of the “district community.” However, this is not necessarily so. One could draw compact districts that group unrelated communities on different sides of a mountain or river, that cobble together areas unconnected by roads so candidates must travel outside their district in order to get from one part of it to another, or that stick adjoining communities together despite the absence of any unifying characteristics. Nevertheless, the widely perceived neutrality of compactness measures provides a court plan with a strong claim of credibility and non-partisanship.¹⁰²

Compactness not only lies in the eye of the beholder, but it can be measured in several ways such that a district that is very compact according to one measure could be non-compact as compared to another. One set of measures compares the area of the district with that of the smallest circumscribing circle, or square or rectangle. Others measure the ratio of the perimeter of a district to its area. Still others might be more sensitive to the number of protrusions from a district, as well as the district’s length or thinness. Several of these measures actually contradict each other, which is to say that as a district’s score increases according to one measure, it decreases according to another measure.¹⁰³ If compactness is a value that the court plan intends to further, settling on

¹⁰¹ See *Vieth v. Jubilerer*, 541 U.S. 267, 291 (2004) (plurality opinion) (describing the anti-Democratic effect of adopting certain traditional districting principles).

¹⁰² See Daniel R. Polsby & Karl Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 339-51 (1991) (discussing quantitative measures of compactness); Joseph E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of “Compactness,”* 50 MINN L. REV. 443, 443-44 (1966) (discussing proposed legislation that would have required compact districts).

¹⁰³ See Richard Niemi et al., *Measuring Compactness and the Role of A Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1158-65 (1990); Gerald R. Webster, *Rethinking the Role of Geographic Compactness in Redistricting*, in BEYOND THE COLOR LINE: RACE, REPRESENTATION AND COMMUNITY IN THE NEW CENTURY 117, 120-31 (Alex Willingham ed., 2002).

one or more of the various measures at the outset can guide the line-drawer in maximizing its value.

2. Contiguity

A district is contiguous if one can walk to each part of the district without having to go through another district.¹⁰⁴ Contiguity is usually not a difficult value to further in a plan. Courts should be aware of a few pitfalls, such as what to do in cases of point contiguity (where two parts of a district connect to each other at a single intersection of two lines) or water contiguity (where one must travel through water in order to go from one part of the district to another) or functionally noncontiguous districts (where the parts of a district appear connected on the map, but the absence of certain roads or bridges means that one cannot travel to all points in the district except by swimming or walking around the district). For the most part, however, the greatest danger with respect to non-contiguity occurs by accident, when line-drawers overlook an errant census block in the middle of a district that they have assigned to another district far away.

3. Respect for Political Subdivision Lines

Respecting political subdivision lines, which is sometimes required by the state's constitution, usually refers to avoiding "splits" of counties, cities or other municipalities. Courts should be clear as to the hierarchy of political subdivisions that need to be protected and how violations of political subdivision boundaries will be measured. If one must choose between splitting a city between two districts or a county between two districts, for example, which political subdivision should one subordinate? In general, courts prefer to avoid splits of the largest subdivisions (usually counties) and tolerate a greater number of splits of cities and (especially) precincts. Also, should all breaks of political subdivision lines be treated equally? In other words, should a small intrusion into a county in order bring a district up to population equality "count" as much as cutting a county completely in half?

There are many different ways to measure respect for political subdivision lines. With counties, for example, one can count the number of counties that are kept whole—meaning that no district line intersects with a county line—and how many counties are split between two, three, and four districts. However, one must decide whether the number of counties that are split or the number of times a county is split is to be minimized. For example, if one is forced to choose between splitting one county into five districts or two counties each into two districts, which decision should one make? One could also articulate this principle from the district's perspective: in other words, how many districts straddle two counties, how many straddle three, etc. One must then decide whether to prefer one district that contains parts of four counties, for example, over two districts that each straddle two counties.

As with compactness measures, there is no normatively superior method for assessing compliance with a political subdivision requirement. Indeed, advocates for political subdivisions sometimes prefer that the city or county be split between two

¹⁰⁴ See Michael McDonald, United States Elections Project: Enhancing Competitiveness in Redistricting, available at <http://elections.gmu.edu/enhancing.htm> (last visited May 20, 2005).

districts as opposed to being unified in one, because then they will have influence over a greater number of representatives. At the same time, when a map splits one county (but not its neighbors) among several districts, advocates for the cannibalized county will likely complain that they will now be ignored by each representative that has just a slice of the county. Similarly, insofar as representatives sometimes wish to have relationships and frequent contact with the local political bodies of the counties they represent, a greater number of partial counties per district might hinder the forming of such relationships.

Finally and perhaps needless to say, protection of political subdivision boundaries often conflicts with the applicable legal constraints and other traditional districting principles. Because some political subdivisions are themselves quite strangely shaped, drawing districts around them might lead to a lower compactness score according to certain measures. As with compactness, however, fidelity to this principle might lead one to draw districts that split communities that happen to straddle a political subdivision boundary. Indeed, in order to prevent vote dilution and a violation of the Voting Rights Act one might need to cross a boundary to unify two minority communities that happen to be divided by a city or county line. Moreover, the greater attention one pays to precise mathematical equality between districts, the greater the number of political subdivisions that will be split.

4. Communities of Interest

Respecting communities defined by common interests, while a value central to any theory of representation, is the most slippery of traditional districting principles. As mentioned above, claims of protection of communities of interest often serve as pretexts for the advancement of partisan goals in the redistricting process. Drawing a district around a heavily pro-Union town is tantamount to creating a Democratic district, for example, just as drawing a district around a Christian Evangelical community would lead to the creation of a Republican district. A court should treat all advocates' claims of communities of interest with skepticism, or at the very least, opponents should be given the chance to enlighten the court as to the partisan interests underlying such seemingly neutral declarations.

With that said, many possible plans for a given jurisdiction could comply with the allegedly neutral requirements of compactness, contiguity, respect for political subdivision lines, and the applicable law. Therefore, information as to the defining features of a community can often give some direction for particular decisions as to whether a line should go this way or that, when the other principles provide no guidance. When a court searches for justifications for its districts, arguments based on communities of interest can often supplement other traditional districting principles in order to bring a sense of coherence to the plan. When one must decide between drawing a line in a random direction or in a way that captures an identifiable community, one might as well draw a line that keeps in tact the community of interest.

One of the most persistent criticisms of court-drawn plans is that, in their haste and based on their lack of knowledge, courts tend to overlook communities of interest. If true, this would be a serious criticism, but when compared to partisan or incumbent-

protecting gerrymanders, court-drawn plans, even unwittingly, tend to do as well, if not better, in the protection of such communities.

5. Preserving Cores or Configurations of Prior Districts

Court plans, especially “least-change” plans, will often try to maintain the cores and configurations of existing districts to the extent possible. By respecting the current district cores or configurations a court plan maintains the identity of the district and usually preserves continuity of representation for voters and their representatives. Of course, the court’s ability to preserve the current district shapes will depend on the extent of the legal violations in those districts and the degree of deference owed to the existing plan. Moreover, some truly serpentine districts do not have a core to respect, so any change might seem like a drastic alteration to the district.

The decision to preserve existing districts has obvious political consequences. By adopting this principle in its plan, the court reinforces the partisan bargain (or lack thereof) underlying the plan it has invalidated. It gives its imprimatur to the current district arrangements regardless of their political bias and regardless of the additional protection such a strategy gives to incumbents. More than anything—perhaps even more than avoiding a pairing with another incumbent—incumbents want to keep the districts that elected them intact. Thus, the decision to follow a principle of preserving district cores or configurations inadvertently is often a decision in favor of preserving safe seats for incumbents.

B. Incumbent Protection

Should court-drawn plans go out of their way to protect incumbents? On the one hand, such a principle, if followed by a court, is fraught with danger. Once it starts paying attention to the effect of its map on certain incumbents, the court may be forced to explain why it protected some incumbents, but not others. Further, many find it wholly inappropriate for a court to heap onto incumbents advantages additional to the many they already enjoy. It might be all well and good for a legislature to protect its own, but why should a court be in the business of placing a thumb on the scale in favor of incumbent reelection?¹⁰⁵

On the other hand, insofar as continuity of representation, let alone seniority and experience, are values of good governance that courts should hope to further, ignoring the effect of a plan on incumbents could lead to one that radically reshapes a jurisdiction’s government.¹⁰⁶ Elsewhere I have discussed in greater depth the arguments in favor of incumbent protection.¹⁰⁷ The arguments are most powerful for courts considering congressional redistricting plans, because a court’s decision to disadvantage incumbents could actually lead to less political power for the state *vis-a-vis* other states. Since

¹⁰⁵ See generally Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 622-30 (2002)(arguing in favor of nonpartisan redistricting).

¹⁰⁶ Not always such an awful development, to be sure.

¹⁰⁷ Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002)(responding to Issacharoff’s argument for nonpartisan redistricting methods).

seniority translates into power in the House of Representatives—*e.g.*, leadership or committee positions—a court plan that culls the number of returning incumbents could have a noticeable effect on the relative power of the state in Congress. Also, the argument in favor of incumbent protection of state legislators has greater force in states with term limits: if incumbents have a short life span to begin with, courts might be less eager to interrupt the constituent-representative relationship than they would under conditions where incumbents can entrench themselves.

If a court decides to protect incumbents, how should it go about it? The first task for a court to perform is to identify who the actual incumbents are. This sounds easier than it actually is, because the court must learn which incumbents are planning to run for reelection. It makes little sense to draw a district for a particular incumbent if that incumbent is not running for office again. Moreover, if the court is releasing drafts of its plan incumbents may change their campaign plans as their district becomes more or less likely to reelect them.

Having identified the incumbents and where they reside, most courts that go down this path will endeavor to reduce the number of incumbent pairings—that is, reduce the number of districts that contain the residences of two or more incumbents. However, pairings too can be deceptive, especially when (as in races for the U.S. House of Representatives) a congressman can run from a district in which he or she does not reside.¹⁰⁸

In order to truly protect an incumbent, a court should pay attention to the character of the district into which the incumbent was placed, rather than merely whether another incumbent will be joining him or her. Indeed, the best way to protect incumbents is to ask them to propose their own districts or to keep them in their current district with minimal changes. A somewhat less gross way to protect them is to return them to a district with a partisan distribution of voters similar to their former district—in other words, keep a Republican incumbent’s district Republican, and a Democrat’s Democratic. Simply removing incumbent pairings, while placing incumbents in radically redrawn and sometimes politically hostile districts, may do very little to serve the alleged values of protecting incumbents.

One final note on this topic: there is an intermediate way to incorporate incumbent protection without turning the court into the handmaiden of politicians who already have tremendous advantages over their opponents in elections. One could draw a plan without paying attention to incumbency and then, as an after-the-fact “quality check,” could make minimal adjustments to the nonpartisan plan in order to reduce incumbent pairings or to return incumbents to their prior districts. By placing incumbent protection last in the queue of principles to apply, the court avoids anchoring each district around an incumbent from the beginning, while at the same time accommodating a limited number of objections or adjustments that could control the potential havoc that the plan might wreak on the state’s legislative delegations.

¹⁰⁸ Courts should be acutely aware of the residency restrictions for candidates. In particular, some states require that candidates reside in their district for a certain amount of time before they can run for election. A court-drawn plan could lead to a situation where certain candidates cannot run from any district. For example, if a state requires that candidates reside in a certain district for one year before running from it, a candidate that has recently moved into that district (as now redrawn by the court) may be ineligible to run both from the new district and from the district that contains his prior residence.

C. Promotion of Competitive Districts

At the opposite end of the good government spectrum from incumbent protection comes the principle that the court should promote competition. Not only should it avoid giving incumbents a leg up, the argument goes, the court should actively try to promote a robust competitive democracy.

Even if a court is hell-bent on promoting competition, though, how should it do so?¹⁰⁹ Practically-speaking, it is often very difficult to create genuinely competitive districts, while at the same time respecting the kinds of traditional districting principles described above. Residential self-segregation of Democrats and Republicans, as well as the strictures of the Voting Rights Act described above, make the construction of politically competitive districts quite difficult. Often, the only way to turn an urban democratic district into a competitive district, for example, is to turn the city into a pizza, with slices radiating out from the inner city and extending to the suburbs and rural areas. In doing so, a court might also run the risk of diluting the minority vote by grouping it with a largely white, suburban, and rural vote.

Furthermore, in order to get a handle on the potential for a hypothetical district to be competitive over the long term, one needs to know whether an incumbent will be running for reelection or whether the district will be an open seat. A court seeking to maximize competition might thus create a district around a Republican incumbent that is more heavily skewed Democrat than it would be if that incumbent chose not to run for reelection. (And of course, the court gets into real difficulties if, after it announces its plan, the incumbent, seeing his new, unfavorable district, decides not to run.)

As mentioned in Part II, the key to producing competitive districts, as with gerrymandered districts, is to employ accurate data that can do a good job of predicting electoral outcomes. Courts, like anyone who must make these approximations on the fly, are not very good at this. The most courts can hope for, I think, is that their plans do not go out of their way to stifle competition.

D. Partisan or Political “Fairness”

Quite obviously the one thing a court cannot do is attempt to use its redistricting power intentionally to further the interests of his or her favored party. But what if, at the other extreme, the judge wants to assiduously avoid appearing biased or unintentionally producing a plan that is? To further that goal a court must remove the veil of political ignorance from its eyes and pay attention to the likely partisan victors under its plan.¹¹⁰ In particular, the court would look at the relative effects of its plan on each party’s incumbents and the expected share of seats each party will win. In the abstract, this task appears fraught with the dangers captured by the political thicket metaphor, and if the

¹⁰⁹ See Michael McDonald, *Enhancing Competitiveness in Redistricting*, available at <http://elections.gmu.edu/enhancing.htm> (last visited March 3, 2005).

¹¹⁰ See *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results. . .”).

court seems like it is in the business of picking winners and losers, the court's plan will lose all credibility. However, at the margins, the court can check to make sure its plan has not had the effect of producing a wildly unrepresentative legislature, or punishing one party's incumbents disproportionately. For example, should the court sit idly by if, when it releases its plan, it sees that it has only paired Republican incumbents against each other, chopped up Republican districts but left the Democratic ones in tact, or overrepresented Democrats by creating a heavily disproportionate number of districts in which their supporters constitute a majority?

The same could be said for the racial fairness of a plan. Even apart from bald violations of the Voting Rights Act, a court may want to avoid opening itself up to the accusation that it paired minority incumbents but not white incumbents, or that it paired women incumbents but not male incumbents. Although the urge to ignore incumbency data looms large, the danger of what might happen as a result often forces courts to peek at the effects of its plan before releasing it. Rarely will everyone involved in redistricting litigation agree that a court-drawn plan is "fair." By looking at the partisan data while constructing its plan, however, a court might be better able to avoid the accusation that its plan is severely biased (in its effects, if not its intent) against one of the parties.

IV. Conclusion

This essay has attempted to lay the groundwork for a more systematic investigation into the patterns of behavior when judges become mapmakers. The law places a number of constraints on judges as they take on the "unwelcome obligation" of venturing deep into the political thicket to draw district lines. Despite these constraints, courts have experimented with a variety of approaches to court-drawn plans. They differ greatly in the procedures they follow and the substantive guidelines that produce the plan. We have come a long way since *Colegrove*,¹¹¹ when the idea of judges drawing maps seemed unthinkable. We still have a way to go, however, to develop "best practices" to guide judges when they are carving democracies.

¹¹¹ *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion).