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Reapportionment's History and Political Impact

Since 1790, and the first federal census of the United States, the number of representatives that each state is entitled to send to the U.S. House of Representatives has been determined by the total population of each state, with few exceptions. The process that is used to allot a state this number is known as reapportionment. Dividing the state up into congressional districts was left up to whatever process each state opted to use, and is usually referred to as redistricting.



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The drawing of these districts can often ultimately contribute to which party wins a specific congressional seat, and as such can be a highly contentious process. In addition to its effect upon the makeup of the U.S. House, reapportionment can add or subtract the number of electoral votes to which a state is entitled to cast in a presidential election. And federal census data is also used in the creation of new legislative districts in the states. Reapportionment has no direct effect upon the Senate today, as each state's two senators are elected in a statewide vote, but before the passage of the 17th Amendment, when state legislatures chose the U.S. senators who would represent their state, it had a more direct impact.

After the federal census determines the population of the United States, that number is then divided by the number of congressional districts (435) to arrive at the approximate number each member of the House will represent. For example, if this number was one million, and a state's population was four million, the state would have four representatives. Of course, states might have a few thousand less than that, or a few thousand more than that, requiring mathematical formulas be used to solve this situation. However, every state is entitled to at least one representative, regardless of the state's population. This lone representative is then known as the "at-large" representative, as that congressional district is the same as the boundary of the entire state. Seven states — Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming — have only one member in the House of Representatives.

Various apportionment methods have been used over the course of U.S. history. Under the Apportionment Act of 1792, for example, Secretary of State Thomas Jefferson's suggestion to require fractional remainders to be discarded when calculating each state's total number of U.S. representatives was accepted by Congress.

The delegates to the Constitutional Convention wanted men, women, and children to all be counted in determining a state's population, and thus the number of representatives they were entitled to in the House. This is why the Constitution requires a census to take place every 10 years, as populations change. The delegates estimated how many representatives each state would be entitled to until the first census would be taken in 1790. (There were censuses taken at the state level prior to this.)

It is believed that the first census probably missed as much as 10 percent of the population, for various



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reasons. One reason was that some Americans knew that censuses were usually a precursor to the levying of taxes. That was the purpose of the census taken in England after the Normans conquered the country in 1066. And of course, perhaps the most famous census in history was that taken by the Romans when Jesus Christ was born in Bethlehem. That census was explicitly taken for taxation purposes.

Who Is Counted in the Census?

Of course, not everyone was counted in the census. The American Indians were explicitly not counted, and neither were foreign diplomats and their families, or persons in the country as tourists. But, since who would be counted would determine the political clout of a state, whether to count those held in slavery was controversial.

Southern delegates wanted all of the slaves to be counted for representation purposes, while Northern delegates preferred that none be counted. About 90 percent of the slave population lived in the various Southern states. As a compromise, it was decided during the Constitutional Convention that three-fifths of the slaves would be counted for both representation and taxation purposes. This is the genesis of the uninformed statement that the Constitution says “Black people are three-fifths of a person.” Of course, that is not true.

Nowadays, illegal immigrants are still excluded from the census, as are diplomats and tourists. During the days in which the states were colonies of the British Empire, immigrants from Europe had come to the Colonies in search of a better way of life — economic, political, and religious. Jews, for example, looked at America as a better place to live than Europe, and both Rhode Island and Pennsylvania especially experienced large influxes of religious immigration because both were quite tolerant of diverse religious viewpoints. Once the states had seceded from the British Empire and won their independence, this immigration from the Old World continued. These people were largely cutting their ties to their previous country, and were settlers in the new land, fully intending to make America their new home.

Today, however, there are large numbers of individuals who are living in the country illegally. Rightly, they should not be counted for representation purposes, as the majority will never become U.S. citizens, and will probably never vote legally. Many have no allegiance to America whatsoever. This is what led the Trump administration to seek to exclude these so-called undocumented immigrants from the census count of 2020.

Predictably, this led to political opposition from those who believe they benefitted politically from the illegal population being counted, leading to litigation in court. Administration opponents argued that the Constitution requires a count of the “whole number of persons.” The administration contended that undocumented immigrants were not inhabitants as the Framers would have used the term when writing the Constitution and making decisions as to how to divide up the number of representatives among the states.

In late December, the U.S. Supreme Court decided not to decide the case, arguing that it would be premature to rule on the case at this time as it is “riddled with contingencies and speculation,” adding, “At the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution” of this case is “premature.”



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While the Supreme Court opted not to intervene on this question, at least for now, past court decisions have dramatically impacted redistricting. In 1962, in the case of *Baker v. Carr*, the court claimed that redistricting was not just a political decision, but qualified as a decision that could be adjudicated in federal court. In *Wesberry v. Sanders*, the court ruled that districts for the U.S. House of Representatives must be approximately equal in population. While some accepted intervention in the redistricting decisions for the federal legislature, the Supreme Court went even further in the case *Reynolds v. Sims* in 1964, in deciding that the Equal Protection Clause of the 14th Amendment required that state legislative districts also had to be equal in population. Some states had modeled their state senates after the federal senate, which protected geographical interests, but that was not acceptable to the High Court.

Whom to count has become increasingly contentious because states can now lose representation, even if they actually make gains in their population. This is because other states are gaining in population at a faster rate. This scenario was not always the case. Until well into the 20th century, as states gained in population, they also gained in the number of representatives they could send to Congress. No states actually lost representation, unless they actually declined in population. Then, in 1929, Congress passed the Reapportionment Act of 1929, which capped the size of the House at 435. The concern was that the number of House members was going to soon outgrow the physical size of the chamber, but that action caused some states to lose some representation, even if they lost no population.

The Effect of Gerrymandering

The drawing of congressional district lines has been controversial since the early years of the Republic. It did not take long after the rise of political parties for state legislators whose party had control of a legislative body to realize that they could draw new boundaries to the advantage of their party. During the second term of Governor Elbridge Gerry of Massachusetts, the Massachusetts Legislature drew new state senate districts that led to the coining of the word “gerrymander.” One district was drawn in such an odd shape that someone remarked that it resembled a salamander. Another person, knowing who had drawn it, laughed and said it was actually a “gerrymander.” That term has stuck to describe the drawing of congressional and legislative district lines to the advantage of the party in power in the legislature.

One gerrymandering method is to place into one district (or as few districts as is feasible) all the voting populations inclined to vote for the minority party, so as to ensure the victory of the ruling party in all of the other districts. For example, in my home state of Oklahoma, following the 1980 census, when Oklahoma had only one Republican (the state now has five) among the six seats in the U.S. House delegation, the Democrats who ran the legislature decided to “stretch” the boundaries of Congressman Mickey Edwards’ district, the lone district then represented by a Republican, from its previous borders confined to Oklahoma County (where Oklahoma City is located), all the way to the Kansas border, giving him as many Republican voters as possible, and thus keeping those Republican voters from affecting the remaining five districts. Republicans predictably cried foul (except for Edwards, who rather liked the security of an overwhelming Republican district), but it was to no avail.

This power to draw both congressional and legislative districts to the advantage of the party controlling the legislature has been criticized by both parties (when they are in the minority, of course). Because of this, several state legislatures have voluntarily surrendered this power to so-called independent or



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bipartisan redistricting commissions (or had it taken from them by ballot initiative petitions in states that have such a process). In most of the states, the legislature maintains primary responsibility, with some states using some sort of “independent” commission. Five states have “independent” commissions, but the legislature can still veto their work, while Arkansas uses a commission made up of the governor, the attorney general, and the secretary of state (though how that is any less partisan than leaving it up to the legislature, if those three executive branch officials are all of one party, is not clear).

Despite the difficulty in truly taking “politics” out of a political process, proponents of stripping legislatures of the power to make redistricting decisions persist. In Oklahoma, for example, Democrats have urged the adoption of these supposedly unbiased commissions (now that the Republicans dominate both houses of the state legislature). A group calling itself People Not Politicians (PNP) spearheaded an effort to create a ballot initiative to create an “independent” commission for redistricting legislative and congressional districts in Oklahoma. The group was unable to muster enough support to get the proposal placed on the 2020 election ballot.

Modern Attacks on Legislative Redistricting Authority

There is a national movement to strip this redistricting power from elected state legislatures and turn it over to unelected bodies. Oklahoma’s Senate President Pro Tempore Greg Treat (the most powerful figure in Oklahoma’s Senate) explained why redistricting commissions are a bad idea. “Liberal politicians like [former] President Obama and his attorney general, Eric Holder, are using these kinds of proposals as a way to support radical progressive viewpoints in Oklahoma and other states. This is a redistricting coup, not an attempt at fair maps.” This way, instead of a Republican-dominated legislature redrawing the lines, districts more favorable to Democrats can be drawn by these supposedly “non-partisan” commissions, which is really just a usurpation of the design of the Founders. When the Constitution was adopted, it included many features that ensured that states would retain considerable clout in our federal system of government. These included the Electoral College (which is likewise under attack), in which the states elect the president. It also included a U.S. Senate whose membership was elected by the state legislatures, with the additional feature that every state legislature would elect two members regardless of size. Unfortunately, the 17th Amendment took this power of election away from the state legislatures, eliminating the powerful leverage a state government can exercise over a senator they believe is not sufficiently defending the state’s interests.

The power to create U.S. House districts, then, is one of the few powers that state legislatures actually still possess that gives them any degree of leverage over their representatives in either house of Congress. Very little was heard about gerrymandering when Democrats dominated this process after the decennial censuses of 1960, 1970, or 1980. This was a major reason why Democrats controlled the House for four decades, yet neither the Democrats nor their allies in the mainstream media considered gerrymandering in favor of the Democratic Party as much of a problem.

But then, after the Republicans captured the House with the 1994 elections and began to dominate many legislative bodies, suddenly there was a supposed “nonpartisan” concern about gerrymandering.

Michael Barone wrote in a recent column, “Democrats have proved adept at gaming” the proceedings of these supposed nonpartisan independent commissions. Still, states that lean Republican — such as Texas and Florida — are expected to gain multiple seats as their populations grow (this will also impact



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the Electoral College vote). Five other states are expected to gain one seat each. In contrast, the Democrat-leaning states of New York, Illinois, and California are all expected to lose seats. (This will be the first time in history that that will happen to California, as disgruntled residents continue to exit the increasingly leftist state and its oppressive government.)

Because of these population shifts, after the present census, Republicans should gain six seats — even without aggressive gerrymandering. This alone would give the Republicans control of the House of Representatives in 2022. With aggressive gerrymandering, Republican legislatures could increase their margins even more.

One problem that the Democrats have, as Barone notes, is that Democratic voters “tend to be clustered geographically, in central cities, sympathetic suburbs and university towns. Republican voters are spread around more evenly.”

In the end, as with all systems of government, nothing is perfect. But it would seem that the best solution is to leave the drawing of both legislative and congressional district boundaries up to elected officials, rather than unelected commissions, who are not likely to be any less “political” than legislators.



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