CED POLICY BRIEF
Gerrymandering Update: Focus on the Courts
May 16, 2022

Under the Constitution, congressional seats are reapportioned, and congressional maps redrawn every ten years based on state population according to a constitutionally mandated census. Congressional House seats are capped at 435, under a 1911 law, and the number of House seats is determined by population, according to a statistical formula in federal law. Each state is then responsible for drawing its congressional maps, so long as it accords with the Constitution and various provisions of the Voting Rights Act of 1965 (as the Supreme Court has interpreted them) which seeks to protect racial minorities’ voting and representation rights.

In April 2021, the Census Bureau released its reapportionment data, showing which states would gain or lose Members in the House of Representatives for the next ten years. This was soon followed in August with the release of the Census Bureau’s redistricting data, which states began using to kick off their redistricting efforts ahead of this year’s midterm elections. This year has seen active legislative sessions, with a number of states reapportioning boundaries for both state and federal elections.

Partisan gerrymandering, the drawing of districts to favor one party, is once again, unfortunately, in full swing. Redistricting efforts have been exacerbated by a closely divided Congress, and new technologies available to mapmakers have made it easier to predict constituent voting patterns and expedite the redrawing to favor one party over another.

In most states the drawing of congressional districts is done by state legislatures and any lawsuits that are filed to challenge the new districts, are argued before state courts where the majority of judges may be elected rather than appointed.

CED recommends two important solutions to the gerrymandering challenge aimed to remove as much partisan maneuvering and distortion from the redrawing of congressional maps, which serves as the foundational support of our democratic system, as possible:

- The establishment of independent state commissions to draw congressional districts every 10 years; and,
- the appointment of judges, on the basis of merit, as opposed to their election, which thrusts the selection for these important positions into politics.

NATIONAL OVERVIEW

2020 Census Reapportionment – Maps Matter

The US Census Bureau reapportionment data released in April – a once-in-a-decade process – had six states gaining House seats starting in the 2022 midterm elections. Five states have gained one House seat — Florida, North Carolina, Colorado, Oregon and Montana — and Texas has added two. But for every seat these states gained, another state had to lose one — with seven states having lost one.
Republican control the redrawing of 187 congressional districts (43 percent). Democrats control the redrawing of 75 districts. In 167 districts, neither party maintains exclusive control either because of independent commissions or split partisan control. (Six Districts are at large representing the whole state.)

Interestingly, many of the fastest growing areas of red states are increasingly Democratic.

Consequently, how the new districts are drawn is very important and, consequently very contentious — making gerrymandering a very important issue in 2022 and for the next decade. The courts play a very important role in the drawing of district maps since gerrymandering challenges are brought before the courts.

Over forty states have redrawn their congressional maps to date, with four states in progress (Kan., Mo., N.H., N.Y.). Forty districts remain to be drawn and lawsuits are pending in several states, as we head into the 2022 mid-term elections.

The key takeaways to date include:

- the number of swing seats is expected to decline; and,
- there are seven fewer highly competitive districts than the old ones.

PARTISAN GERRYMANDERING DEVALUES OUR DEMOCRACY

Partisan gerrymandering harms American citizens in at least two important ways.

First, partisan gerrymandering devalues citizens’ votes — their most fundamental rights and protections under our rule of law. In most states, legislators have the ability to establish their own districts, a process often used to secure incumbents and preserve their party’s hold on power. Consequently, they impose themselves on the voters who should have the power to choose or reject their own representatives. Of the 435 seats in the U.S. House of Representatives, only 37 — 8.5 percent — were decided by margins of less than 5 percent in 2020, even though the aggregate national vote was as close as 50.8 percent versus 47.7 percent. 90-percent-plus of voters live in uncompetitive districts. When the outcomes of elections are foregone conclusions, the demoralizing sense that “my vote doesn’t count” devalues our democracy.

Second, districts that are weighted heavily in favor of one party can lead to elected officials at the extremes, rather than the center, of each party, as there is little need to appeal to independent voters to win, and party primaries in these gerrymandered districts add to this centrifugal force. As a result, fewer centrists head to Washington or to state capitals, making it more difficult for the two parties to work across the aisle, fueling the policy gridlock.
The Senate, which is elected according to state boundaries that are not redistricted, might restore some stability, but even that safeguard fails. With gerrymandered districts not just for the House of Representatives but also for state legislatures, the entire “farm team” from which future Senate candidates are chosen is groomed for extremism. The majority of citizens who are somewhere near the center have no candidate for whom to vote. Nearly nine out of ten voters oppose gerrymandering.

The impact of continued bickering over Congressional districts is taking its toll. For example, in Ohio, which lost one district after the 2020 Census, the contention over the gerrymandering attempts has resulted in early voting beginning while legal battles continue over the drawing of the map. Caught in the crosshairs, Congressman Bob Gibbs, a Republican from Ohio’s Seventh District, recently announced his sudden retirement after serving six terms, calling himself a casualty of “the circus” over the state’s unresolved congressional map. The Ohio Supreme Court laid out a timeline for arguments over the congressional map that extended well past April 5, when early voting began for the May 3 primary election. The order is a blow to the National Democratic Redistricting Committee (NDRC), which asked the court to expedite written arguments to have them finished by March 30. Ahead of the vote, Gibbs’s northeast Ohio district became unrecognizable under the temporary maps, forcing Gibbs’ decision. Almost 90 percent of the electorate in the new Seventh District, with nearly two-thirds drawn in from another district are, as he stated, “foreign to any expectations or connections” to the district he now serves.

ATTENTION SHIFTS TO THE COURTS

Challenges to gerrymandering are brought before the courts. At this point in the current redistricting cycle, courts are once again playing a strong role, with mixed results for those who oppose gerrymandering. About 21 states congressional maps have been challenged in court with six (in Alabama, Kansas, Maryland, New York, North Carolina and Ohio) overturned, although Alabama’s was reinstated.

As state legislators work to adopt new district maps, each of three common scenarios may lead to a redistricting lawsuit. First, the state house and senate agree on a map, and the governor signs it into law. In this scenario, parties may sue if they believe that the bill that the governor signed is unconstitutionally gerrymandered or violates the Voting Rights Act by failing to adhere to “one person, one vote.” Second, the state house and senate agree on a map, but the governor vetoes it. Third, the state house and senate cannot agree on a map. Under these two scenarios, parties may sue to ensure an accurate map is drawn in time for an upcoming election.

Federal courts have an essential role to play in checking state officials and state courts, a result of Bush v. Gore, which clarified that federal courts have the authority to review state elections; if state officials act in an arbitrary way in presidential elections, they violate the Equal Protection Clause. But court challenges are also happening on the state level, and recent Supreme Court decisions have shifted the activity in that direction. Voting rights are also addressed more directly in state constitutions, giving the state courts more jurisdiction in these cases.

It is important to note that while states use a variety of methods to select judges, most states use elections as some part of their selection process. CED has long argued that an appointment system that
included non-partisan commissions selecting judges on merit, would be far superior and would contribute to distancing the selection of judges from the political fray.

**Legal Precedent: Shelby v. Holder & Gill v. Whitford**

The legal environment surrounding redistricting changed in two major ways due to two Supreme Court cases: *Shelby County v. Holder* and *Gill v. Whitford*.

The Supreme Court decision in *Shelby County* struck down a portion of the Voting Rights Act of 1965 that provided procedures of preclearance with the Department of Justice or a federal district court for certain states which have a history of discrimination. As a result, a number of states including Georgia, Florida, North Carolina, Arizona, Alaska, and Texas are now able to draw legislative maps without the preclearance requirement. There is a push in Congress to restore preclearance provisions through the John Lewis Voting Rights Act.

In *Gill v. Whitford*, plaintiffs argued that an extremely partisan map violates the Equal Protection Clause because it diluted the strength of voters in one party. The Supreme Court rejected that, declaring that there was no clear violation of the Equal Protection Clause; in practice, this means that a state can adopt a highly partisan map if its focus is voting behavior (what is termed “political gerrymandering”) rather prohibited racial discrimination (which is still grounds for rejecting a gerrymandered electoral map). Taken together, these two cases mean that the Supreme Court is extremely unlikely to consider redistricting cases based solely on political gerrymandering, so long as the state can maintain that the grounds for gerrymandering is political rather than racial. However, there have still been numerous court challenges to state maps.

**Alabama Redistricting Case**

In February, the Supreme Court ruled by a 5-4 vote to block a lower court order to require Alabama to redraw its redistricting map to include two districts likely to elect Black House members. The Supreme Court decision was made, in part, because the order would have caused too much disruption before the May 24 primary elections. The Supreme Court added the Alabama dispute to the justices’ docket to be fully briefed and argued this fall, putting the 1965 Voting Rights’ Act again before the Supreme Court later this year.

**MAJOR REDISTRICTING CASES IN THE CURRENT CYCLE**

**North Carolina and Pennsylvania Decisions—Gerrymandering by State legislatures overruled**

Earlier this year, state courts in North Carolina and Pennsylvania struck down congressional district maps after finding that their state legislatures failed to adopt plans in line with state constitutional and statutory requirements. In response, Republican-aligned groups asked the US Supreme Court to overturn the state court decisions and adopt a newly advanced theory that would bar state courts from ruling on election disputes involving federal offices. The US Constitution’s Election Clause says that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The Republican state legislatures interpreted that clause as
meaning that only state legislatures may make election rules unless the federal government passes contrary legislation. Refusing to intervene in the redistricting disputes in both states, the US Supreme Court rejected GOP requests to restore maps approved by Republican-controlled state legislatures — in other words, upholding courts’ right to review the decisions of state legislatures.

On February 4, a divided North Carolina Supreme Court struck down the state’s new maps for congressional and General Assembly seats, declaring that the lines were drawn to secure Republican advantage. The Court found that that partisan gerrymandering violated provisions in the North Carolina constitution on the right to free elections, freedom of speech, and equal protections of citizens. The ruling overturned the previous month’s decision by three trial judges that let the maps stand. During the lawsuits leading to the Court’s ruling, statisticians presented evidence of their analysis of trillions of map simulations showing the new lines were likely to give Republicans ten of fourteen US House seats in a state where voters are roughly equally divided between the two parties.

A three-judge panel of the state Superior Court in Raleigh adopted a new map drawn by a nonpartisan panel that appeared to equally split the state’s congressional districts between Republicans and Democrats, giving each party six relatively safe House seats and making the remaining two competitive. After the North Carolina Supreme Court refused to block the Superior Court’s ruling, Republican state officials asked the US Supreme Court to hear the case. The US Supreme Court allowed the court-imposed maps to stand.

The Pennsylvania case stands apart from North Carolina’s, as the Pennsylvania Supreme Court never threw out a legislative map — instead, it selected its own. On February 23 of this year, after months of public hearings, failed legislative negotiations, and arguments across the state’s appellate courts, the Pennsylvania Supreme Court settled on a new congressional map. The new map differs only slightly from the state’s existing congressional map, which the Pennsylvania Supreme Court commissioned in 2018 after declaring an earlier map drawn by the state legislature to be unconstitutionally gerrymandered in Republican favor.

Similar to the North Carolina case, Republican litigants made the case to the US Supreme Court that state legislatures have a unique power to set election rules, and the state Supreme Court’s decision to choose a map violates the US Constitution. In congruence with the North Carolina case, the US Supreme Court allowed the Pennsylvania Supreme Court’s map to stand.

**Michigan—Independent Commission wins victory but map still faces challenges**

The Michigan Independent Citizens’ Redistricting Commission, established through a 2018 voter-backed referendum, makes Michigan one of ten states that has delegated the primary responsibility for drawing congressional districts to an independent commission. Previously one of the most gerrymandered states, Michigan’s voter-backed independent commission has moved it towards much fairer maps. This effort to forestall partisan gerrymandering has successfully faced a major challenge in court, but other challenges continue.

In January of this year, a group of Michigan Republicans filed a federal lawsuit challenging the new congressional map adopted by the state’s redistricting commission. The lawsuit, filed in the US District
Court for the Western District of Michigan, alleged that there is no legal justification for the population differences between the congressional districts and that the lines unnecessarily split up counties and municipalities. The Republican challengers requested a three-judge panel to redraw the map.

Under the 1964 Supreme Court decision *Wesberry v. Sanders*, congressional districts within a state are required to have relatively the same population size. In addition, the lawsuit pointed that the new districts split up counties and municipalities in violation of the Michigan Constitution. The complaint contends that counties and municipalities are to be considered “communities of interest,” and should not be broken up as its residents share common policy concerns and would benefit from being maintained in a single district. Line-drawing reflecting “communities of interest” is the third-ranked criteria in the state constitution. The Republicans who sued the commissioners alleged that by splitting up “communities of interest,” the commission violated the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.

The three-judge panel dismissed the group’s claim that the new congressional district map arbitrarily divided counties and municipalities. The unanimous six-page opinion written by Judge Raymond Kethledge of the US Court of Appeals for the 6th Circuit called the claim “a blood relative” of partisan gerrymandering claims that the courts are not capable of deciding under US Supreme Court precedents. "Just as the Constitution allows States to draw lines for congressional districts based on partisan interests, so too it allows them to ‘fragment’ voters’ ‘communities of interest,’” reads the opinion granting the motions to dismiss the claim. “And no principle discernable in the Constitution can direct a court’s decision as to when such fragmentation ‘has gone too far.’" Lawyers representing the state’s redistricting commission argued that any allegations related to the decision to divide counties and municipalities belong in state court, not federal. Additionally, they asserted that the Republicans’ claim conflated the “communities of interest” criteria. The opinion states that the US Constitution does not give a federal court the ability to determine what constitutes a “community of interest” within a state.

The commission currently faces another lawsuit challenging the new maps, this time filed by a group of Black voters. The challenge issued to the US District Court for the Western District of Michigan alleges that the commissioners illegally disenfranchised Black voters in the Detroit metro area because they eliminated majority-Black districts in the state Senate and reduced the number of majority-Black districts in the state House. The revised complaint alleges a Voting Rights Act violation.

**Maryland and New York: Positive Results**

**Maryland**

On March 25, Senior Judge Lynne A. Battaglia blocked Maryland’s new congressional map, finding that the plan violates the Maryland Constitution and Declaration of Rights and unfairly favors Democrats. The map is the first Democratic-drawn map to be struck down by a court in this redistricting cycle. Judge Battaglia considered the map to be a “product of extreme partisan gerrymandering” and found that testimony in the case supported the argument that “the voice of Republican voters was diluted and their right to vote and be heard with the efficacy of a Democratic voter was diminished.”
In Maryland, where Democrats hold a strong majority in both legislative chambers, the GOP has long criticized the state’s map as one of the most partisan gerrymandered in the country. The state found itself in a unique situation for change – a standing Republican governor during a redistricting year. Governor Larry Hogan, determined to draw a fairer map, created a separate commission to draw the state’s congressional seats and legislative districts in an effort to take politicians out of the map drawing process. Governor Hogan submitted the maps drawn by the commission to the Democrat-controlled General Assembly, but the legislature moved forward with maps approved by a separate panel including top legislative leadership: four Democrats and two Republicans. Hogan vetoed the map, which was nonetheless approved again in December by the Democrat-controlled General Assembly.

Only five days after Judge Battaglia’s decision, a quickly redrawn map was passed March 30. Governor Hogan agreed to approve the new maps after Democrats dropped their appeal of Judge Battaglia’s ruling. Hogan described the deal as “a tremendous victory for democracy and for free and fair elections in Maryland” and considers the new map “a huge improvement” over the former one. The new map for Maryland’s eight US House seats, which was also drawn by the General Assembly, makes the districts more compact. The new map is likely to result in a delegation similar to the current one, with Democrats favored to win six districts and Republicans to win one, leaving the eighth competitive. The map rejected in court would have created seven safe Democratic districts and one competitive district.

New York

On April 21, a New York appellate court ruled that new congressional districts drawn by the Democrat-controlled legislature violated the state’s ban on partisan gerrymandering, partially upholding a lower court ruling that would prevent the state from using the lines in this year’s upcoming midterm elections. The new map was expected to favor Democratic candidates in 22 of New York’s 26 congressional districts. Democrats currently hold 19 seats with Republicans holding 8 (New York will lose one seat this year). The divided five-judge panel in Rochester claimed that Democratic leaders drew the House map “to discourage competition and favor Democrats.” The judges also stated that the new lines violate a 2014 state constitutional amendment designed to halt politically motivated redistricting.

After Governor Kathy Hochul and top legislative leaders appealed, the New York Court of Appeals on April 27 rejected the new congressional maps, agreeing with Republican plaintiffs who argued it constituted unconstitutional gerrymandering. The state’s highest court ruled that Democratic leaders had violated the state constitution when they took it upon themselves to draw the new congressional and state senate districts after an independent redistricting commission failed to reach a consensus and that a special court master would be left to draw new district maps rather than the Legislature, setting the stage to delay the June 28 party primaries for the congressional and state senate districts until August 23.

On May 2, national Democrats made an eleventh-hour appeal to a federal court to intervene, hoping to reinstate the original maps. The Democrats asked the panel of federal judges to use their authority to block the state court’s decision, and instead require New York to hold its election in June as planned, using the map adopted by the Democratic legislature. A federal judge on May 4 denied the request.
On May 16, the New York courts issued a revised map prepared by a court-appointed Special Master, rebuffing the advantage drawn into the Democratic state legislature map. The revised map combines several districts in which incumbent Democrats will now run against each other in primaries scheduled for August 23 and also will increase competitiveness in several additional seats, raising to eight the number of competitive seats. A court still needs to give its final approval to the plan.

**A ROLE FOR INDEPENDENT, NONPARTISAN REDISTRICTING COMMISSIONS**

Independent, nonpartisan commissions produce fairer, more competitive elections, incentivizing the American people to exercise their most fundamental right. In the December-released op-ed *Stop the Gerrymander*, CED Trustees highlighted that redistricting should be in the hands of nonpartisan, independent state commissions, and not be overridden by politicians. Those commissions should be charged with applying neutral criteria to draw fair, competitive district lines.

Ten states now have commissions that carry the primary responsibility for redistricting: Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, Virginia, and Washington; four (Maine, New Mexico, New York, and Utah) have advisory commissions, and three (Connecticut, Indiana, and Ohio) have “backup” commissions of bodies smaller than the legislature as a whole. Iowa maintains a system under which nonpartisan staffs draw maps which are then subject to legislative vote.

Nonpartisan, independent commissions, if structured properly, strengthen the voice of voters, improving the accountability and responsiveness of government to citizens’ views. The two major political parties have little incentive to give up gerrymandering, so it is incumbent on citizens and leaders in the private sector to demand that districts be drawn by nonpartisan, independent commissions.